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Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES

JONATHAN MCCRAY,
Petitioner,
v.

PEE DEE REGIONAL TRANSPORTATION AUTHORITY; GEORGE SIMMONS; ELAINE BARKLEY; EDWARD ROBINSON; ANDY INGRAM; BILL BOYD; THEODORE BURNS; JAMES B. KNIGHT; LARRY FOSTER; STEVEN RAST; ALPHONSO CAMPBELL; HAROLD KORNBLUT; NANCY FINKLEA, in their official capacities as Board Members and individually, BEN KNIGHT, As Executive Director,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Chalmers C. Johnson
Counsel for Petitioner
3612 Lincoln Court, NE
Renton, WA 98056
TEL (843) 576-9975

QUESTIONS PRESENTED

I. Has the record presented direct evidence of racially discriminatory intent for a case under 42 U.S.C. 1981 where the decision makers have been shown to have made clearly racist comments, related to the decision to terminate, and some of which were contemporaneous with the decision to terminate?

II. At Summary Judgment, does a lack of any record of the employer's evaluation of the employees performance, and multiple employer and third party investigations revealing that the employee had been performing adequately create a genuine issue of material fact as to whether the employee was performing his duties within his employee's reasonable expectations?

III. Should the Court consider a pretextual reason given my the employer for termination, or a failure to give a reason for termination at the time of termination, to be evidence sufficient to create a genuine issue of material fact as to whether the employer's motives for the termination were racially discriminatory?

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OPINIONS BELOW

The Court of Appeals for the fourth Circuit issued an Order affirming the District Court's dismissal of this case on Summary Judgment on February 6, 2008, after oral argument.

JURISDICTION

On February 6, 2008, the Appeals Court for the Fourth Circuit found that the Petitioner was correct as to his challenge of the District Court's dismissal by res judicata, but affirmed the District Court's Dismissal of Mr. McCray's case upon the Defendant's Motion for Summary Judgment on other grounds. This Court Has Jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS AT ISSUE

None.

STATE STATUTORY PROVISIONS AT ISSUE

None

STATEMENT OF THE CASE

The Pee Dee Regional Transportation Authority (PDRTA) is a regional transportation provider, governed by a Board of Directors and administered by an executive staff. The RTA's bid for government contracts to serve the counties in South Carolina. Historically, the PDRTA Board has been split, racially, about fifty-fifty. The workforce was 96 percent black and 4 percent white. In 1991, the Civil Rights Division of the U.S. Justice Department investigated allegations of an extreme racial imbalance in management (all white) vs. workers (almost all black). The Civil Rights division issued a report in 1993. Black members of the Board demanded an effort to recruit black applicants into management. Mr. Livingston (white), the Executive Director, retired in 1994. Livingston contacted Jonathan McCray (African American) asking him to apply for the Executive Director position, as the Board needed minorities

in management. McCray, Director of Transportation for Berkeley County, declined, concerned about racial strife within the PDRTA. In May of 1994, Livingston again called and said the Board was having difficulties "finding qualified black transit managers." Again encouraging McCray to apply. McCray agreed. The board selected a "short list" of three applicants. McCray was number three. The Board offered the job to, a black male from Indiana, who declined. The second candidate, a white male, asked for more money, and was declined. McCray was offered the position and asked for a week to consider. During the week, Mr. Mack, a board member, called, and told McCray that the PDRTA had over a hundred black drivers but no black executive staff members. He claimed the operators' morale was low and he was afraid that if a qualified African American was not selected for a management position soon, the Justice Department would cite

the PDRTA for racially discriminatory hiring practices. McCray accepted. Mr. Simmons, the interim Executive Director, confirmed that there was unrest on the issue of race, but stated that he hoped once McCray took office, things would settle down. Shortly after his accepting the position, McCray received a call from Mr. Boyd, the chairman of the PDRTA personnel committee. He said that just because McCray had been named as Executive Director, it did not mean he could "come in and undo all the good things that the white folks had done." Boyd said that certain white staff members, James Knight (Assistant Director), Gladys Lufty (Accounting manager) and Debbie Hanna (Executive Secretary), were "not to be touched." McCray spent his first year as Executive Director learning the organization and working hard to promote new policies and procedures. He felt that the board had begun to gain some confidence in his abilities as time wore on, the

Board accepted most of his recommendations.

In January of 1996, the Upper Piedmont Regional Transportation Authority (UPRTA) collapsed, and was being shut down among allegations of criminal mismanagement. The SCDOT Commissioner asked for the PDRTA's help. While investigating, McCray met Mr. Rast, a Board member of the failed transit Authority (Rast is white). McCray immediately mistrusted Rast, as he seemed to be offering little or no support for the revival of his own transit authority. McCray then learned that the last days of the UPRTA had been rife with controversy as it was set upon by the local media, which appeared to have been fed derogatory information about the RTA by an inside source. In the end, it was decided that the damage to the UPRTA's reputation had been so extensive, that it could not function under the same leadership or name and expect to have any kind of support from the public. The Counties served by the

UPRTA were incorporated into the service area for PDRTA, with state funding support. Because the PDRTA had suddenly grown, it incorporated new board members. The Board swelled to 23 members, and McCray set about implementing the expansion into the upstate. Under McCray's leadership, the PDRTA's rise to become the largest RTA operating in the state was nothing less than meteoric. Things went smoothly, and garnered a positive response from the public in the new counties.

In September of 1997, one of the new board members resigned, and Mr. Rast became a board member of the PDRTA. At his first meeting, in October of 1997, Mr. Rast began requesting a job description for the Executive Director and demanding, at the meeting, to know what "authority" the Executive Director wielded. From that point on, Mr. Rast kept up a constant attack on McCray, requesting audit after Audit (all of which showed that McCray was following

procedures, and that the PDRTA's financial situation was healthy). McCray became aware of Rast's true motivations when a board member related to him Rast had been selected as a replacement for the resigning board member to "help Ingram and Barkley get rid of the black director and bring in a white director." Rast continued with a barrage of requests for audits and demands that McCray produce financial records. Each report he received showed up in the Rock Hill Herald, the same paper which had heralded the demise of the UPRTA. In Early 1998, Rast began to call the FTA (Federal Transit Administration) in Atlanta, pushing the FTA to change the formula it used for "matching" funds. There are federal grants which will offer federal dollars to RTA's to match funds that the RTA is able to raise from the State. Also, in 1998 Ms. Lufty, who had been the finance Director for about 25 years, presiding over the federal matching procedures for

decades, resigned. The new Finance Director, Ms. Bali, was Indian, by racial heritage.

McCray began to receive dire warnings from supporters who believed that what Rast was doing was wrong. Mr. Kirsh, supporter of Mr. Rast was heard to have said "I won't sleep at night until y'all run that nigger out of my county." At the end of the year celebration in 1998, Rast approached McCray and told him: "Jonathan, you better resign; it's only going to get worse."

In 1999, Mr. Rast called for audit after audit. There were at least six in 1999, none of which revealed anything remarkable. After intense and incessant urging from Rast and his cronies, the FTA changed its policies concerning matching of federal funds to State funds. It basically disqualified the type of funds that the PDRTA had been using as matching funds for decades under Ms. Lufty's guidance (a formula which had originally been sanctioned by the

FTA), then decided to *retroactively* apply the change to the PDRTA, but only during those years when Ms. Bali and McCray were in office. The FTA claimed the PDRTA owed a repayment of about $800,000.00. McCray immediately went into action to see the wrong righted. He was successful (after a campaign of letters to the FTA and representatives), as the debt was eventually forgiven by an act of Congress in 2005.

In May, 2001, Board Members Barkley, Ingram, and Simmons began calling Mr. Gardener, the Chairman of the Board (who was white, but supported McCray), demanding that he Schedule a vote to terminate McCray. They told Gardener "we need to stick together as white board members." McCray had brought in over 17.5 million dollars in capital funds to the PDRTA, and had incorporated more and more counties into the PDRTA service area. One white board member who thought McCray was

performing well, Benjy Rogers, commented to Barkley that she had never treated Mr. Livingston, the former executive director (who was white) in that manner. Ms. Barkely responded "the only difference between you and that black S.O.B. is that you're white and he is black. The first chance we get, we are going to run his ass out of town, no matter how good you think he is.." That the termination of McCray was a racial issue became obvious to the board. supporters told McCray that the majority of them felt he was doing a good job, and told him not to "bow to the racist group led by Rast, Barkley and Ingram and Robinson." Rast became ever bolder. During one phone call to McCray, he said, as he hung up the phone, but before the line was disconnected, "I hate that black son of a bitch."

At the May 2001 meeting of the Board, Barkley and Robinson asked for Mr. McCray 's resignation. McCray asked what was the reason for the request. The board's attorney stated that

the Board did not have to tell him anything. McCray did not resign. Robinson made a motion to terminate McCray, but the vote tied. McCray was not terminated.

As the next monthly meeting of the board approached, Gardener, the chairman, called McCray, saying that he was receiving pressure to help "the whites" fire McCray. The white board members were insisting that Gardener place the termination on the agenda for the month of June. At the June meeting, Robinson and Rast approached McCray, and told him "we are going to get your black ass tonight." That meeting resulted in a figurative blood bath. The board deposed Ray Gardener, the chairman who had supported McCray. Gardener, who suffered from Parkinson's Disease, was overwhelmed, and left the meeting. As Gardener left, Robinson yelled to McCray, "We are gonna get your ass next." The new Chairman refused to preside at the meeting, stating that his official duties did not

start until the following month. Nobody wanted to preside. After two demands were made by the board, Mr. Boyd, the man who had warned McCray, in his early days as Executive director, not to undo what "the white folks" had done, agreed to chair the meeting. A vote was taken to terminate Mr. McCray. Again, no reason was given for the termination effort. This time the vote passed, and McCray was terminated. The Board members again refused to give any reason for the termination. McCray was told to clear his office and leave the building immediately. Ms. Bali drove him to a nearby hotel (as the board insisted that he not use the PDRTA vehicle he had driven to the meeting). Mack and Malloy had told McCray to stay the night, and that they would sort things out in the morning. McCray, who was still in possession of the PDRTA credit card, paid for his room with it.

The very night that McCray was terminated, Mr. Rast resigned from the PDRTA

Board of Directors, his mission apparently accomplished. Mr. Knight, the former assistant Director, was quickly and quietly appointed as Executive Director, without any competition. Mr. Knight had applied for the Executive Director position back in 1993, when Mr. McCray was hired, but had not made the "short list" of candidates for the Executive Director job at that time.

Mack encouraged McCray to file a grievance of the decision to terminate him with the Board. McCray did. The hearing was set for the July meeting. Mr. Malloy, the Chairman of the Personnel Committee, gathered twelve affidavits (of 23 board members) for proxy votes, calling for McCray's reinstatement. McCray accompanied Mr. Mack to the meeting. Unbeknownst to them, Robinson had signed a warrant, personally (rather than as an action of the board) for McCray's arrest, claiming McCray had paid for the one night he had stayed at a

motel after his termination, with a PDRTA credit Card. A television news crew was waiting in the parking lot to witness the arrest. As Ms. Jones (the recorder for the meeting) was setting up her equipment, Robinson and Mr. Simmons (the new Chairman), Robinson, Barkley, and Knight arrived early, and called off the meeting. Jones was told to pack up and leave before the meeting started, ostensibly, for lack of a quorum. She states: "I wondered why Mr. Simmons had cancelled the meeting when Board Members were still coming in." At least 13 board members arrived after the meeting had been cancelled for a lack of a quorum. A Sheriff's deputy approached Mack's truck and arrested McCray, with news cameras blazing. After Mr. McCray had been cuffed and taken away to jail, Robinson preened for the reporters. He told one reporter "we had to take drastic actions to show him that it was over."

The June 2001 financial report showed that the PDRTA had not been in any financial trouble under McCray. A Personnel Committee investigation showed that McCray had not violated any of the PDRTA's by-laws. None of the many audits in the past two years (including a SLED investigation) turned up any wrongdoing by McCray. in 2005, the signing of the Transportation Act forgave the debt to FTA, finding PDRTA not at fault. The board fired Ms. Bali shortly after McCray's termination.

In February of 2002, eight months later, it became obvious to the board that McCray would sue. Mr. Knight, the new Executive Director was ordered, by Board Member Barkley, to "dig, dig, dig, and find something on McCray." The board had no facts to support any claims against Mr. McCray, even at that late date.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

THE COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER EVIDENCE SHOWING NO NEGATIVE EVALUATIONS AND MULTIPLE AUDITS OF EMPLOYEE'S PERFORMANCE SHOWED ADEQUATE PERFORMANCE IS EVIDENCE THAT EMPLOYEE WAS PERFORMING TO THE EMPLOYER'S LEGITIMATE EXPECTATIONS.

THE COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER RACIST COMMENTS BY DECISION MAKERS, DIRECTLY RELATED TO TERMINATION, ARE DIRECT EVIDENCE OF RACIAL MOTIVATION FOR A TERMINATION.
THE COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER AN EMPLOYER'S REFUSAL TO GIVE A REASON FOR TERMINATION AT TERMINATION, AND FOR MONTHS THEREAFTER PRESENTS A GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER THE TERMINATION WAS RACIALLY MOTIVATED.

I. The comments made by decision makers qualified as direct evidence of racism as motivation for the decision to terminate.

McCray claims that he was terminated in violation of 42 U.S.C. 1981 as a result of racial discrimination. If a plaintiff has presented "direct or circumstantial evidence that raises a genuine issue of material fact as to whether an impermissible factor such as race motivated the employer's adverse employment action," he is under no obligation to make out a prima facie case. Diamond v. Colonial Life & Acc. Ins. Co., 416 F.3d 310, 318 &n.4 (4th Cir. 2005). In establishing evidence of discrimination, derogatory remarks may constitute direct evidence, as long as the remarks were related to the employment decision and were not stray or isolated. Brinkley v. Harbour Recreation Club, 180 F.3d 598, 608 (4th Cir. 1999) abrogated on other grounds by Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003). In it's Opinion the Appellate

Court acknowledges evidence of racist statements from some of the board members who voted to terminate McCray. It even acknowledges that many of the statements related directly to the decision to terminate McCray. One such comment "we are going to get your black ass tonight," which was made on the night of the vote to terminate, was clearly contemporaneous with the adverse employment action. The District Court and Appellate panel discount the statements as insignificant and insufficient to constitute direct evidence. The record contains several quotes from board members which should be accepted as direct evidence of discriminatory intent:

A) Mr. Gardener, Chairman of the PDRTA Board (who is white): In May, 2001, Board Members Barkley, Ingram, and Simmons began calling me concerning Mr. McCray's Employment. They wanted to get rid of him. They said we need to stick together as white

board members.

B) Mr. Benjy Rogers, (a white) PDRTA Board Member: In spite of the success of bringing over 17.5 million dollars in capital funds to the region, Ms. Barkley and others refused to acknowledge or respect Mr. McCray's abilities. While talking to Ms. Barkley about her unfair assessment of Mr. McCray she said "The only difference between you and that black S.O.B. is that you're white and he is black. The first chance we get, we are going to run his ass out of town, no matter how good you think he is.."

C) Jonathan McCray (Petitioner), repeating a statement from Mr. Boyd, the white interim Executive Director who presided over the vote to terminate McCray, referring to a conversation which took place when McCray was hired as executive director for the PDRTA: "He then named three people, - ...then said something that made me cringe;

he sated quite emphatically that the people he had just named were not to be touched. …just because I had been named Executive director, it didn't mean that I could come in and undo all the good things that the white folks had done."

D) Jonathan McCray (Petitioner): I was told specifically that one of Mr. Rast's sponsors, Mr. Herb Kirsch, declared, "I won't sleep at night until y'all run that nigger out of my county." At the year end employee celebration, Mr. Rast whispered to me, "Jonathan, you better resign; it's only going to get worse."

E) Jonathan McCray (Petitioner): I had been told by other members of the Board that the majority of them felt that I had done a good job and should not bow to the racist group led by Rast, Barkley and Ingram and Robinson.

F) Jonathan McCray (Petitioner)

"The Chairman, Mr. Gardener, was called every day place on the agenda the termination of McCray. When he did not agree to her demands, she vowed to get rid of him. Shortly thereafter I heard, from a Board member, that Mr. Burns and Mr. Ingram called Mr. Gardener a nigger lover."

G) Jonathan McCray (Petitioner) I clearly heard Mr. Rast refer to me as a black son of a bitch. In fact he stated, "I can't stand that black son of a bitch."

H) Jonathan McCray (Petitioner) conversation with Mr. Gardener, Chairman of the Board: March 2001, Mr. Gardener told me he received a lot of calls from Barkley and Ingram. They wanted him to join the white members of the Boar in a united front to get rid of McCray. Mr. Gardener told me that Barkley kept insisting that the whites have to stick together on this one!

I) Jonathan McCray (Petitioner) Mr. Rast and Mr. Robinson told me, "were are going to get your black ass tonight." At the June meeting, when McCray was actually terminated, Robinson made the motion to terminate, and Rast seconded it.

These quotes show direct evidence that McCrays termination was racially motivated.

II. The lack of any negative evaluation of McCray's performance contemporaneous with his employment, and numerous audits, all showing no wrongdoing, should be considered evidence that McCray was performing at the level of his employer's legitimate expectations.

Under Title VII and 42 U.S.C. 1981, the required prima facie cases for a circumstantial case of race discrimination are the same. Gariola v. Com. Of Va. Dept of General Services, 753 F.2d 1281, 1286 (4th Cir. 1985). The Plaintiff must show: 1) he is a member of a protected class; 2) his performance satisfied his employer's

legitimate expectations 3) he was dismissed, and 4) after dismissal, the position was filled by a member of a non-protected class. Id. McCray is African American, was qualified for his position (the board hired him). He was terminated, and replaced by Mr. Knight, who is white. As to whether McCray was performing sufficiently, therecord shows that McCray's performance was excellent, if not flawless. Although the PDRTA points to several issues which it blames on Mr. McCray ***now, during this litigation***, the record shows no support for its contentions. The record does clearly show, from the testimony of Ms. Barkley that, in February of 2002, months after the termination, the Board still had no grounds to complain about McCray (but had decided to start looking for some). The Court's order, in this case, as does the appellate opinion from the fourth circuit, not only finds that many of the PDRTA's assertions of poor performance are not credible but fails to identify any that they do find

credible. The Courts completely ignore the fact that the PDRTA was unable to state that McCray was actually terminated because any of the problems which were, after the fact, and during this litigation, blamed on him. Because the PDRTA used poor performance as it's challenge to the prima facie case element, and as its asserted non discriminatory reason for the termination, the Petitioner, rather than repeating all of the evidence concerning Mr. McCray's performance, respectfully refers the Court to the discussion, below, regarding evidence of pretext as to PDRTA's assertions of poor performance against McCray.

III. Evidence that the employer gave no reason for the termination at the termination and only attempted to create a pretextual long after the termination, in response to litigation, should be considered sufficient to create a genuine issue of material fact as to whether the decision to terminate was racially motivated.

Where and employer attempts to create false evidence of a legitimate reason for termination, and the pretext is uncovered as such,

it is permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation. Reeves v. Sanderson Pluming Products, Inc. 530 U.S. 133 (2000).

"Under this commonsense principle, evidence suggesting that a defendant accused of illegal discrimination has chosen to give a false explanation for its actions gives rise to a rational inference that the defendant could be masking its actual, illegal motivation." Whether the employer "was in fact motivated by discrimination is of course for the finder of fact to decide." Justice Ginsburg Id.

A. The board offered after acquired reasons for termination, which are shown to be pretextual.

The PDRTA gives a laundry list of reasons which, as shown below, were not given at the time of termination. At the time of

termination, the Board could not disclose its true reason for terminating McCray (race discrimination). It was mute on the subject of motive... vehemently mute.:

Edward Robinson (white) PDRTA board member:

Q: Did you ever accuse Mr. McCray of being partial to black people?

A: I don't remember. I don't remember.

Q: When Mr. McCray was terminated, was there a reason given by the board for his termination?

A: I'm sure there was, but I can't remember what it was.

Q: Were you present at the June meeting.....

A: Yes, sir.

Eight months later, under the specter of a lawsuit, they admit that the board did not know whether McCray had done anything to warrant termination. Instead, the board started to "dig dig dig" for some after acquired reason:

Q. What were the things you felt he had done?

A. I didn't know.

Q. So, you didn't know that he had done anything?

A. No Sir.

Q. You just wanted something dug up on him?

A. Well, I mean, we didn't know any facts.

Then, in an incredibly incautious example of overkill, the PDRTA blamed EVERYTHING on McCray. Although the District Court and the appellate panel recognized that the PDRTA was simply blaming all problems on McCray after the fact (Judge Wooten states "While this Court is not prepared to conclude that all problems of the PDRTA were the fault of plaintiff McCray..." they failed to recognize the significant amount of evidence which showed the Defendant's assertions themselves to be pretextual, or to weigh the pretextual claims as prima facie proof of discriminatory intent:

1) **The one million dollar line of credit** that the PDRTA claims was not authorized, was actually authorized by the Board as part of a bid requirement for a Title XIX contract. Larrie Foster, chairman, and approved it in 1999.

2) **The $250,000.00 line of credit was in place before McCray was hired, and could not have been applied for by McCray**

3) **Audits in 1999 show no wrongdoing and financial well-being** A total of six audits in 1999 showed nothing remarkable.

4) **The Legislative Audit Council audited the PDRTA in 1999**, retuning a finding with no significant problems.

5) **SCDOT and a private firm performed audits in 2000.** After a private firm audit with no significant findings, another audit by the SCDOT, which cost $800,000.00 resulted in finding no significant problems.

6) **The FTA (Federal Transit Authority)**

and SLED (State Law Enforcement Division) investigated McCray McCray instructed his staff to cooperate fully. The investigators found no wrongdoing.

7) **The FTA retroactive findings and demand for repayment only back as far as 1998, after the resignation of the white finance manager:** The FTA changed its policies, retroactively applied the change to the PDRTA, but only during those years when Ms. Bali and Mr. McCray were in office. The FTA, itself, had approved a matching formula for the PDRTA years before McCray took office. Ms. Bali the Interim Director of Finance since Spring of 1998, testified that the board was aware that it was not due to financial mismanagement. The retroactive application back to 1998 resulted in the FTA claiming a repayment of about $800,000.00. In 1994 and 1997, the FTA returned no comment on the same matching formula which it claimed was a violation in 1998

through 2000. McCray was successful (after a campaign of letters to the FTA), in saving the PDRTA. The debt was forgiven by an act of Congress.

8) **A May 2001 independent audit and Finance Committee report showed no mismanagement or financial issues.** at the meeting where a vote failed to terminate McCray, the Finance Committee absolved McCray of any allegations of mismanagement.

9) **In May 2001, the Personnel Committee declared McCray had violated no personnel procedures.**

10) **The PDRTA had reconsidered and was about to reverse the termination when the white board members stopped the meting and had McCray wrongfully arrested in order to keep him from appearing.** The July financial reports (the month after McCray's termination, showed that, even in McCray's last month of employment, there were no financial problems.

Robinson can not remember:

Q. You said that one of the problems that you had with Mr. McCray was financial. What did the financial reports in July of 2001 show as far as the PDRTA's financial condition?

A. I don't remember.

Robinson, who brought the motion to terminate McCray, personally, signed a warrant for McCray's arrest to keep McCray from reinstatement. "we had to take drastic actions to show him that it was over."

11) **After the termination, McCray was vindicated, as to the FTA matching issue debt.** In the recent Transportation Act, Congress forgave PDRTA's debt to FTA finding PDRTA not at fault.

12) **Months after McCray's termination, the Board ordered the new Executive Director to "dig dig dig" to find some after acquired basis for termination** Mr. Knight candidly testified that about eight months

after McCray was terminated, he was ordered to "dig, dig, dig, and find something on McCray."

13) Board Member Barkley admits that, in February of 2002, the Board had no evidence against McCray

If the Board had a legitimate reason for terminating McCray at the time of termination, why not assert it at the time of termination, and why, eight months after the termination, would the same board need to 'dig, dig, dig' to find some reason to justify the termination?

B. The Board refused to give a reason for termination at the time, and, eight months later, was still reaching to create a legitimate reason to have terminated McCray.

1) The Board gave no reason for the termination, despite demands for one.

A) J.W. Mack, Sr. (Board Member): "At the June 21, 2001 Board Meeting, the Board, in a 9-7 vote, terminated Mr. McCray as the Executive Director, but refused to provide him with a reason for the termination despite his

request."

B) Minutes of PDRTA Board Meeting, June 21, 2001: "Mr. McCray asked Mr. Robinson for the record, what specifically was the charge" [No response is given]

C) Minutes of PDRTA Board Meeting, June 21, 2001: "Mr. J.W. Mack asked for a reason for the termination of the Executive Director. The attorney stated only if the maker of the motion wants to give a reason." [no reason is given, and the meeting is adjourned]

D)Benjy Rogers (Board Member): "For instance, there was never any formal evaluation of Mr. McCray that I could recall."

E)Edward Robinson: Q: You made the Motion to terminate Mr. McCray? A: Yes Sir. When Mr. McCray was terminated, was there a reason given by the Board for his termination? A: I'm sure there was, but I can't remember what it was.

F)Jonathan McCray(Petitioner): "March

was the first official call by a board member for my resignation. I asked Mr. Robinson, what was the reason? His response was, 'Because I said so.'"

2) Eight months after McCray's termination the Board began looking for justification for McCray's termination.

In February of 2002, ***eight months after the vote to terminate McCray,*** Ms. Barkley, one of the white board members who had spearheaded the vote to terminate McCray in May and June of 2001, ordered Knight (the Executive Director) to "dig dig dig and find something on Mr. McCray." Knight testified:

Q. Do you remember the remark?

A. I remember the remark.

Q. What do you remember about the remark?

A. Nothing other than the remark.

Q. She didn't give a reason for it?

A. No.

At her deposition, Barkley testified that there were no facts pointing to any wrongdoing by McCray as Executive Director of the PDRTA.

Q. What were the things you felt he had done?

A. I didn't know.

Q. So, you didn't know that he had done anything?

A. No Sir.

Q. You just wanted something dug up on him?

A. Well, I mean, we didn't know any facts.

A reasonable person could find that the board had no legitimate reason for the termination and was hiding an illegitimate reason, specifically, race discrimination.

CONCLUSION

For the reasons set forth above, Petitioner JONATHAN MCCRAY, respectfully prays that the Court grant a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Fourth Circuit in this case.

Chalmers C. Johnson*
3612 Lincoln Court NE
Renton, WA 98056
TEL (843) 576-9975

*Member, Supreme Court Bar
Counsel for Jonathan McCray

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APPENDIX

Chalmers C. Johnson
Counsel of Record for Petitioner
3612 Lincoln Court NE
Renton, WA 98056
(843) 576-9975

APPENDIX

Rule 14(i)

Rule 14 (i)(i) Opinions, Orders, Findings of fact and conclusions of law entered in conjunction with the judgment sought to be reviewed

Order of U.S. District Court
October 16, 2006,. 1

Unpublished Opinion, 11th Circuit Court of
Appeals, May 23, 2007. . . . . .5i

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

Ray E. Gardener and Jonathan McCray,	)C.A. No. 4-04-CV-) 1948 TLW
Plaintiffs,	)
	) ORDER
Pee Dee Regional Transportation Authority; James B. Knight, in his official capacity as Deputy Executive Director and individually; George Simmons, Elaine Barkley, Edward Robinson, Andy Ingram, Bill Boyd, Theodore Burns, Larry Foster, Steven Rast, Alphonso Campbell, Harold Kornblut, and Nancy Finklea, in their official capacities as Board Members and individually,	)
Defendants.	)

This matter is before the Court upon defendants'

motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. (Doc # 14). Plaintiffs filed the instant action on June 18, 2004, with an amended complaint being filed on July 2, 2004. (Docs # 1&4). Defendants filed an answer on August 10, 2004. (Doc. #6). Thereafter, defendants filed their motion for summary judgment on august 8, 2005. (Doc. # 14) Plaintiffs filed a response in opposition to defendants' motion for summary judgment on September 21, 2005. (Doc # 21) Defendants filed a reply on October 12, 2005. (Doc #26). A hearing was held and the Court heard oral argument from counsel on defendants' outstanding motion on February 10, 2006. For the reasons set forth in the Order, the defendants' motion for summary judgment is hereby granted.

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BACKGROUND1

This matter has been brought by plaintiffs

related to plaintiff Gardener's failure to be re-elected as the Chairman of the Board of Directors for the Pee Dee Regional Transportation Authority (hereinafter "PDRTA") on June 21, 2001, plaintiff McCray's termination as the PDRTA executive director on June 21, 2001, and plaintiff McCray's arrest on July 16, 2001, for alleged misappropriation of PDRTA funds. Plaintiffs have alleged causes of action pursuant to 42 U.S.C. Section 1981; 42 U.S.C. Section 1983; the First Amendment to the United States Constitution, as well as a state law claim under south Carolina law.

Plaintiff McCray is the former executive director of the PDRTA, a position he held from 1994 until June 21, 2001. Plaintiff gardener is a former member of the PDRTA Board of Directors, who served as chairman from June 2000 until June 2001. The PDRTA is a regional transportation authority established pursuant to S.C. Code Ann Section 58-25-10 et seq. The

defendant James B. Knight is the current PDRTA deputy director. The remaining defendants are, or were at the relevant times, members of the PDRTA Board of Directors.

Beginning in 1997, defendant Rast, followed by Robinson, and then over time, others assert they began to have serious concerns regarding the manner in which plaintiff McCray was operating the PDRTA, specifically with regards to how plaintiff McCray's performance affected the PDRTA's financial condition. Two main issues that defendants assert were of concern to various board members included (1) lines of credit and loans which defendants contend were obtained without obtaining the signature of the board chairman, as required by the

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1As is required at this stage of the proceedings, all of the facts are considered in a light most favorable to the plaintiff as non-

moving party.

PDRTA bylaws; and (2) results from the Federal Transit Administration's triennial review of the PDRTA which found, among other things, that the PDRTA was seriously deficient in the financial area, with the result of such deficiencies being the suspension of certain grant money to the PDRTA as well as a directive to repay amounts for overdraw of funds and overpayments related to local match requirements. Additionally, during plaintiff McCray's tenure as executive director, according to the record, certain vendors would deal with the PDRTA on a cash only basis, the PDRTA was not allowed to purchase gas at state discounts but rather had to purchase gas on a private credit cards at retail prices, and PDRTA was delinquent in its payments on worker's compensation and other insurance premiums.

As a result of these issues, at the May 24,

2001 board meeting, a motion was made requesting that plaintiff McCray tender his resignation. The motion failed for want of majority, with nine voting for the motion and nine voting against it. Of the nine votes against the motion to request plaintiff McCray's resignation, three came in the form of proxy votes which were held by plaintiff Gardener, who was chairman of the board at the time.. Although apparently not raised as an issue at the time, there appears to be have been some later question about the validity of those proxies.

Also at the May 24, 2001 meeting, the board's nominating committee presented, for informational purposes only, its recommendation for the slate of officers for 2001-2002. Among those presented was plaintiff Gardener, who was nominated to serve a second term as chairman of the board.

At the June 21, 2001 board meeting, the nominating committee presented its slate of

officers, including plaintiff Gardener, for election. Nominations were taken from the floor, and George Simmons was nominated for election to the position of chairman of the board. Simmons was elected

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To serve as chairman of the board for 2001-2002 by and eight to six vote. Accordingly, plaintiff Gardener lost the election. Plaintiff Gardener left the board meeting after the election of Simmons as chairman, even though Simmons tenure did not begin until July 1. A temporary chairman was appointed for the remainder of the June 21, 2001 meeting. A motion was made to terminate plaintiff McCray as executive director. The motion passed on a nine to seven vote. The board made the termination effective immediately and plaintiff McCray was ordered to turn over all PDRTA property.

Plaintiff McCray, at the time of his termination was a resident of St. Stephens, South

Carolina, and had been driving to and from work in a PDRTA vehicle. Although apparently arrangements were made to transport McCray home that evening, he chose instead to stay in Florence at a Hampton Inn and Suites. The charge for this room was reflected on a PDRTA credit card statement received from Wachovia sometime in July of 2001. The charge was discovered by Knight, who advised board member Robinson of what was believe to be an unauthorized charge. Ultimately, Robinson made the decision to notify law enforcement and sign an arrest warrant for Plaintiff McCray.

On the evening of July 12, 2001, some, but not all, board members arrived at the PDRTA premises for a specially called board meeting. The meeting was called to order by Simmons, the chairman of the board of directors. Simmons adjourned the meeting after determining there was a lack of quorum to conduct official businesses. Plaintiff McCray

was also on the PDRTA premises that evening and was placed under arrest by Florence County Sheriff's Office deputies based on the aforementioned warrant. Ultimately on August 31, 2001, the charge against the Plaintiff was dismissed.

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In 2001, plaintiff McCray instituted a lawsuit in the Florence County Court of Common pleas against PDRTA, Knight, Barkley, Simmons, Robinson, Burns, Ingram, Boyd and Rogers asserting claims for malicious prosecution, defamation, and civil conspiracy. The state circuit court granted defendant's motion for summary judgment on both service of process and substantive grounds.

This action followed with plaintiffs filing the original complaint on June 18, 2004, and an amended complaint on July 2, 2004. As previously indicated, plaintiffs have alleged causes of action pursuant to 42 U.S.C. section

1981; 42 U.S.C. section 1983; the First Amendment to the United States Constitution, as well as a state law claim under South Carolina law. Defendant have moved fro summary judgment on all grounds as to both plaintiffs.

ARGUMENTS

With respect to plaintiff Gardener's 42 U.S.C. 1982 claim, the defendants assert that plaintiff Gardener's claim fails on all counts for the following reasons: first, because Gardener cannot establish that he is a member of a racial minority, since he is a white male; second, because Gardener admitted during the course of his deposition that he has no proof that he has been discriminated against because of his race; and third, because Gardener cannot establish any alleged discrimination affected his ability to engage in activity protected under section 1981. Plaintiff's response is that "Gardener's race is irrelevant [because] 42 U.S.C. 1981 protects, 'all persons.'"

As to Plaintiff Gardener's 42 U.S.C. 1983 claim, the defendants maintain that plaintiff Gardener has no evidence that his failure to be re-elected as chairman of the PDRTA board of directors was the result of any racially discriminatory animus or other illegal classification. Plaintiff Gardener's response is that he was removed because of his support for Plaintiff McCray, who is black, and that the opposition of Plaintiff Gardener because of his "allegiance with a particular racial

Class would violate the equal protection clause."

Finally, as to any claim raised by plaintiff Gardener pursuant to the First Amendment, the defendants contend that the July 16, 2001 meeting, at which Gardener contends he was not allowed to vote (by proxy-plaintiff Gardener did not actually attend this meeting), was not held because there was not a quorum of board members present to conduct official business.

Defendants contend that the quorum rule is a viewpoint neutral rule which was not a constitutionally prohibited content based restriction on Gardener's First amendment rights. Finally, Defendants contend that plaintiff Gardener was free to assemble, associate, and speak on other occasions, publicly or otherwise. Plaintiff asserts that defendants conspired to prevent and did prevent the meeting from taking place. Plaintiff suggests that the defendants left the PDRTA because 7:00 o'clock pm, blocked the entrance, and told board members there was no meeting because of Plaintiff McCray's arrest. Plaintiff Gardener indicates that he was not allowed to represent his constituents, and that there was no countervailing government interests in preventing his voting.2

With regards to plaintiff McCray, defendant initially asserts that all of plaintiff McCray's claims in this action should b dismissed based on the principles of res

judicata.. Plaintiff asserts that the first action was decided on procedural issues, and that the parties and issues on the prior state case and the current federal case are not identical.3 As to plaintiff McCray's 42 U.S.C. 1981 and

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2Defendants indicate that it does not appear that the fourth cause of action for abuse of process relates to plaintiff Gardener, but rather is limited to plaintiff McCray alone. No argument as to any such claim is presented by plaintiff in its brief in opposition to defendants' motion for summary judgment motion. As there appear to be no allegations or evidence of any civil or criminal process instituted against plaintiff Gardener, no abuse of process claim exists as a matter of law.

3Defendants assert that plaintiff McCray's abuse of process claim is barred by the state two year statute of limitations. Plaintiff asserts that under state law the appropriate

statute of limitations is three years. However, given the court's ruling to dismiss all of plaintiff McCray's

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1983 claims, defendants assert that plaintiff McCray fails to establish a prima facie case of discrimination because he cannot prove that he was performing to his employer's satisfaction, nor can he prove that his termination was the result of intentional discrimination. In response, plaintiff cites as general case law on the civil burden of proof being a preponderance of the evidence, and indicates that a plaintiff can meet that burden using direct or circumstantial evidence. .

Finally, with regards to plaintiff McCray's First Amendment claims, defendants reiterate that the July 16, 2001 board meeting was not held because of a lack of quorum. Defendants also assert that plaintiff McCray was not engaged in or attempting to engage in any

protected activity. Additionally, defendants indicate that plaintiff McCray was free to assemble, associate, and speak on other occasions, publicly or otherwise. Plaintiff indicates that he was arrested before he had the opportunity to speak at the 7:00 meeting, and that his reinstatement was a matter of public concern.4

SUMMARY JUDGMENT STANDARD

Pursuant to Federal Rule of Civil Procedure 56(c), summary judgment should be granted when the pleadings, responses to discovery, and the record reveal that "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." Charbonnages de France v. Smith, 597 F.2d 406 (4th Cir. 1979). Once the movant has met its burden, the non-moving party must come forward with specific facts demonstrating a genuine issue

Federal claims, the Court will decline to exercise jurisdiction over the remaining state law claim, and accordingly, does not find it necessary to decide the statute of limitations issue as it concerns the state abuse of process claim.

4Again, defendants offer argument as to the merits of plaintiff's abuse of process claim, and why they believe it should be dismissed. However, given the Court's ruling to dismiss all of Plaintiff McCray's federal claims, the Court will decline to exercise jurisdiction over the remaining state law claim, and accordingly, need not consider these arguments or the merits of any alleged state law claim for abuse of process.

For trial. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

A genuine issue exists "if the evidence is such that a reasonable jury could return a verdict

for the non-moving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). However, the party opposing summary judgment may not rest on mere allegations or denials and, in any event, a mere "scintilla of evidence" is insufficient to overcome summary judgment. Id. At 249-50.

When considering summary judgment motions, courts must view the facts and the inferences therefrom in the light most favorable to the party opposing the motion. Id. At 255; Miltier v. Beorn, 896 F.2d 848 (4th Cir. 1990); Cole v. Cole, 633 F.2d 1083 (4th Cir.) Indeed, summary judgment is only proper "[w]here the record taken as a whole could not lead a rational Trier of fact to find for the non-moving party, there [being] no genuine issue for trial." Matsushita Elec. Indus. Co. V. Zenith Corp., 475 U.S. 574 (1986)(internal quotations omitted).

DISCUSSION AND ANALYSIS

A. Res Judicata Principles with Regards to Plaintiff McCray.

This Court will initially address the defendants' argument that res judicata should apply to bar all of the claims raised in this lawsuit by plaintiff McCray. Under res judicata principles, a prior judgment between the same parties can preclude subsequent litigation on those matters actually and necessarily resolved in the first adjudication. In re Varat Enterprises, Inc., 81 F.3d 1310, 1315 (4th Cir. 1996)(Citing Restatement(second) of Judgments 13 et seq (1982); Allen v. McCurry, 449 U.S. 90,94 (1980); and Federal Deposit Ins. Corp. v. Jones, 846 F.2d 221, 234-35 (4th Cir. 1988)). This doctrine encompasses two concepts: claim preclusion and issue preclusion, or collateral estoppel. Id. Rules of claim preclusion provide that if the later litigation arises from the same cause of action as the first, then the judgment bars litigation not only of every matter actually adjudicated

In the earlier case, but also of every claim that

might have been presented. Id.

Generally, claim preclusion occurs when three conditions are satisfied: 1) the prior judgment was final on the merits, and rendered by a court of competent jurisdiction in accordance with the requirements of due process; 2) the parties are identical, or in privity, in the two actions; and, 3) the claims in the second matter are based upon the same cause of action involved in the earlier proceeding. Id.; see also, kenny v. Quigg, 820 F.2d 655, 669 (4th Cir. 1987). This Court finds all three criteria present in the instant case.

First, the order of dismissal entered by the state court in plaintiff McCray's earlier civil action was final and on the merits. Although the state court did conclude that service of process was insufficient, and that it lacked personal jurisdiction over the Defendants, the Court, assuming arguendo that the defendants were properly served, went on to include a complete

discussion on the merits and concluded that the defendants were entitled to summary judgment. This Court concludes that the sate court order constitutes a final judgment on the merits with res judicata effect. Second, all parties to the previous state court action are parties in the instant action. There are five additional defendants named in this case that were not named in the earlier action. However, these individuals(defendants Rast, Kornblut, Foster, Campbell, and Finklea) were (and/or are) all PDRTA board members, similarly situated to the individuals sued in the earlier court actions. Third, the claims in the instant action were or could have been adjudicated in the former suit. Hilton Head Center of South Carolina, Inc. v. Public Service Com'n of South Carolina, 362 S.E.2d 176, 177 (S.C. 1987). Generally, claims are part of the same cause of action when they arise out of the same transaction

Or series of transactions, Harnett v. Billman, 800 F.2d 1308, 1314 (4th Cir. 1986)), cert denied, 48-U.S. 932 (1987), or the same core of operative facts, in re Varat Enterprises, Inc., 81 F.3d at 1316. Claims may arise out of the same transaction or series of transactions even if they involve different theories or measures of relief. Harnett at 1314. Although, the Court has considered plaintiff's argument that the state court action deals only with Plaintiff McCray's arrest and aftermath, and that the present action is concerned with the sabotage of the meeting to recall McCray as director, this Court is sufficiently persuaded by defendants argument that the same issues and transactions at issue in this action were at issue in the earlier state court action. This concludes that the claims raised in the instant suit are part of the same cause of action as the state suit because they arise out of the same transaction or series of transactions, or the same core of operative facts. Accordingly,

these claims were or could have been raised in the previous suit. Because of the requirements for claim preclusion are satisfied, the judgment in the first case acts as an absolute bar to this subsequent action with regard to every claim which was actually made and/or those which might have been presented. Justice Oaks, 898 F.2d at 1552.

B. Plaintiff McCray's 42 U.S.C. 1981 and Equal Protection claims

Even if the Court were to assume that the doctrine of claim preclusion did not apply to bar the claims alleged by plaintiff McCray in this suit, plaintiff McCray's claims still fail on the merits. In the amended complaint, plaintiff McCray claims he was terminated from his position as the PDRTA executive Director in violation of 42 U.S.C. 1981 and under 42 U.S.C. 1983. Section 42 U.S.C. 1981(a) provides:

All persons within the jurisdiction of the United States shall have the same right in every

State and Territory to make and enforce contracts, to sue, to be parties, to give evidence and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties,

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Taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C.A. 1981(a)

With respect to plaintiff McCray's 1983 claim, he alleges that defendants violated his rights under the fourteenth amendment of the United States Constitution to equal protection under the law. Under Title VII and either 1981 or 1983, the elements of the required prima facie case are the same. Gairola v. Com. Of Va. Dept of General Services, 753 F.2d 1281, 1286 (4th Cir. 1985). Absent direct evidence of discriminatory treatment, those elements require

the plaintiff to show (1) that he is a member of the protected class; (ii) that he was qualified for the position and that his performance satisfied his employer's expectations; (iii) that, despite his qualifications and performance he was dismissed; and (iv) that, after his dismissal, the position was filled by a member of a non-protected class5 Id. Ultimately, the establishment of a prima facie case of employment discrimination requires proof by a preponderance of the evidence that plaintiff was not promoted

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5This Court does not find any allegations by Plaintiff McCray or sufficient evidence of, any direct evidence with regards to plaintiff McCray. In McCray's affidavit #1, he indicates that in 1999, after a telephone conversation that he had with the Defendant, Rast, where Rast thought plaintiff McCray had hung up on him, plaintiff McCray indicates that he heard Rast sat that "I can't stand that black son of a bitch."

Also in the affidavit of Benji Rogers, Mr. Rogers indicates that in a conversation he and Ms. Barkley had, she said "[t]he only difference between you and that black S.O.B. is your white and he is black. The first chance we get we are going to run his ass out of town, no mater how good you think he is." In proving discriminatory motive with direct evidence of the employer's statements, "the alleged discriminatory statements must directly relate to the particular person, employment decision, or pattern of decision making." Holtz v. Jefferson Smurfit Corp., 408 F.Supp.2d 193, 202-03 (M.D.N.C. 2006)(Citing EEOC v. Clay Printing Co., 955 F.2d 936, 941 (4th Cir. 1992)). Thus, plaintiff must show a connection between any discriminatory statements and the employer's action. Id. At 203. To be direct evidence of discrimination, the statement must be more than a fact of life that has no "disparaging undertones." Id. (Citing Birkbeck v. Marvel

Lighting Corp., 30 F.3d 507, 512 (4th Cir. 1994)). While such statements, if made, would certainly be inappropriate, they simply do not rise to the "direct evidence" standard. If evaluated as direct evidence, the Courts ultimate decision in this cases would be the same. See Pence v. Tenneco Auto. Operating Co., Inc. 2006 WL 547831, *3, n.3 (4th Cir. 2006).

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Or dismissed "under conditions which, more likely than not, were based upon impermissible racial considerations." Id. If a plaintiff establishes a prima facie case of discrimination, the burden of production shifts to the employer to produce evidence that it acted with a legitimate, nondiscriminatory reason. Williams v. Stables, Inc., 372 F.3d 662, 667 (4th Cir. 2004). The burden assumed by the employer is one of production not of persuasion. Id. At 668. If an employer satisfies its burden of production, the burden returns to the plaintiff to establish

that the defendants' proffered reason was mere pretext and that race was the real reason. Id. At 668. The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). Similarly, to succeed on an equal protection claim, a plaintiff must first demonstrate that he has been treated differently from others with whom he is similarly situated and that the unequal treatment was the result of intentional purposeful discrimination. Morrison v. Garraghty, 239 F.3d 648, 654 (4th Cir. 2001).

Here, plaintiff McCray does not establish a prima facie case under 42 U.S.C. 1981 or the equal protection clause, because the plaintiff cannot show that he was performing to his employer's satisfaction and that his termination was the result of intentional discrimination. The record establishes based on evidence submitted

by the defendants, to which the plaintiff has proffered no persuasive evidence to rebut, that during plaintiff McCray's tenure, and while he served as executive director of the PDRTA, the following issues asserted by the defendants came to light:

1. Plaintiff McCray obtained a $1,000,000.00 line of credit, a $250,000.00 line of credit and a loan in the amount of $214,161.40, without authorization by the board of directors. The defendants assert the executive director (plaintiff McCray) executed

These lines of credit drew down on funds without the signature of the chairman of the board, as required by the PDRTA bylaws.6 At the time of plaintiff McCray's termination, the PDRTA owed $445,198.00 on the $1,000,000.00 line of credit and $110,750.36 on the $214,161.40 loan.

2. The record submitted by defendants

establishes that the Federal Transit Administration (Hereinafter "FTA") determined that the PDRTA was deficient in 10 of the 22 areas reviewed under its Triennial Review of the PDRTA. Significantly, the FTA determined that the PDRTA was deficient in the financial area, including such things as insufficient local share match revenue, insufficient documentation to support draw-loan requests, overdraw of funds, and the like.

3. The record submitted by defendants establishes that the FTA suspended disbursement of grant monies to the authority.

4. The record submitted by the defendants establishes that the FTA required that all draw down requests be submitted by the PDRTA be specifically reviewed and approved.

5. The record submitted by the defendants establishes that the FTA directed the PDRTA to repay the United States Treasury $170,980.00, plus interest, for an overdraw of funds for the

purchase of two buses.

6The PDRTA by-laws expressly provide that the chairman of the board of directors "shall be the signatory on behalf of the Authority of all agreements, contracts, deeds, notes, mortgages, bonds or other instruments which commit the Authority to an expenditure of funds or use of resources, except as otherwise specified by vote of a majority of the membership voting." Art. III, 1. The by-laws also provide that "[a]ll bonds, notes, mortgages and other evidence of indebtedness of the Authority shall be signed by the Chairman except as otherwise specified by vote of the majority membership." Art. VI, 2.

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6. The record submitted by the defendants establishes that the FTA directed that PDRTA to recalculate local match requirements for fiscal years 1998, 1999, and 2000. Based on the recalculation it was determined that PDRTA

owed the FTA $895,083.00 (plus interest) for overpayments which resulted from the PDRTA's improper treatment of local share revenue and other financial errors.

7. IN addition to the FTA grant issue and review which resulted in a determination that the PDRTA owed the FTA *895,083.00, defendants assert that another federal/local match issue arose surrounding a direct congressional appropriation in the amount of $3,000,000.00 for construction and capital which occurred during plaintiff McCray's time as executive director. As a result of the attempt to utilize improper state funds as a match to the appropriate federal funds, the defendants assert that the FTA determined that the PDRTA owed $600,000.00.

8. The record submitted by defendants indicates that during plaintiff's tenure, PDRTA was unable to purchase gasoline for its vehicles through contract with the State of South Carolina, but was instead forced to utilize credit

cards and purchase gasoline at retail prices. After plaintiff's termination, PDRTA was again able to purchase gasoline using state credit cards through its contract at significant discounts.

9. Defendants assert that certain vendors would only deal with PDRTA on a cash-only, no credit, bass during Plaintiff's tenure.

10. Defendants assert that during plaintiff McCray's tenure, PDRTA was delinquent in its payments to the workers' compensation carrier and to the state insurance plan.

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The Defendants assert as a result of these matters that it was apparent that while plaintiff McCray was serving as executive director, the PDRTA was having some serious financial and management issues. The problems identified by the FTA, as well as the demands for repayments of significant sums of money, according to the defendants, threatened the continued viability of the PDRTA. Additionally, the defendants assert

that plaintiff McCray undertook many acts which were either outside the authority of an executive director, or were in excess of the authority granted by the Board. For these reasons, this Court cannot conclude that plaintiff McCray can establish a prima facie case of employment discrimination because he is unable to establish the second element of the prima facie case, I.e., he is unable to show that his performance satisfied his employer's expectations.

Even if plaintiff McCray could establish a prima facie case, these same facts would also support the employer's burden of production to produce evidence that it acted with a legitimate, nondiscriminatory reason. Plaintiff McCray has not offered any evidence sufficient to establish that the defendant's proffered reason was mere pretext and that race was the real reason. See Gairola v. Com. Of Va. Dept. of General Services, 753 F.2d 1281, 1287 (4th Cir. 1985)(finding that even assuming plaintiff

established her prima facie case, defendants adequately rebutted the presumption of discrimination under McDonnell Douglas by articulating legitimate reasons for her dismissal without a showing that such reasons were merely a pretext for unlawful discrimination). This court does not act as an inspector general or auditor to determine if all allegations by defendants against plaintiff McCray are without question true or accurate. This court evaluates the evidence to determine if it is sufficient to conclude plaintiff McCray was performing to his employer's satisfaction and whether or not his termination was the result of intentional discrimination. The record before the Court reflects that the defendants acted to terminate plaintiff McCray based on his

Performance and not his race. While this court is not prepared to conclude that all problems of the PDRTA were the fault of plaintiff McCray, it is

sufficient to conclude that the proffered reasons for termination were not pretextual or based on race.

Additionally, this court notes that in reviewing plaintiff McCray's deposition, plaintiff's responses with regards to questions concerning evidence of discriminatory motive and intent in his termination are primarily based on unsupported speculation and assumption, and focus on alleged personal animus which he believed some board members held against him, and disagreements with board members. Although in his complaint and at oral argument, plaintiff referred to "white and black factions" of the board, this court finds insufficient evidence to of such "factions." In fact, this court finds it significant that of the nine board members voting in favor of plaintiff McCray's termination as executive director, four were African American.

This court concludes that plaintiff McCray fails to establish a prima facie case of

discrimination and fails to show that his termination was the result of intentional or purposeful discrimination. There is sufficient evidence in the record to establish that plaintiff McCray was terminated because his performance did not satisfy his employer's expectations. Accordingly, plaintiff McCray's claims pursuant to 42 U.S.C. 1981 and the Equal Protection Clause are dismissed.

C. Plaintiff Gardener's 42 U.S.C. 1981 and Equal Protection Claims

With regards to plaintiff Gardener's 42 U.S.C. 1981 claim, the Court has already set forth the relevant portion of 42 U.S.C. 1981 and the elements of a prima facie case. Initially, plaintiff Gardener does not meet the first element of the prima facie case because he is not a member of the

Protected class.7 Plaintiff Gardener is a white male. Additionally, plaintiff argues that under

law, a white individual who is injured as a result of his efforts to defend the rights of non-whites, has standing to sue under 1981. However, plaintiff Gardener has offered no sufficient evidentiary basis for this court to conclude that plaintiff Gardener was not re-elected to a second term as chairman of the board because of his efforts to defend the rights of plaintiff McCray as an African American. See generally, Alder v. Columbia Historical Soc., 690 F.Supp. 9, 15 (D.D.C. 1988). Although, plaintiff testified that he was opposed because of his support for McCray, he also indicates that a number of individuals did not like him, in part because they did not like plaintiff McCray, but also because he (Gardener) ran a rigid meeting and would not let them talk. The record reflects, as defendants assert, that similarly to plaintiff McCray, plaintiff Gardener was not re-elected as chairman of the board because during his period of leadership issues hat threatened the viability

of the PDRTA came to light and PDRTA board members were displeased by plaintiff Gardener's alleged lack of concern in addressing their problems. Additionally, the record reflects some

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7This Court does not find admissible evidence in the record of direct evidence of discriminatory intent with regards to plaintiff Gardener. This Court has carefully reviewed the allegation in plaintiff's amended complaint that plaintiff was known by certain defendants as a "nigger lover." This allegation is serious and the use of such terminology is not appropriate in any circumstance. However, after a careful review of the record, this Court finds no admissible evidentiary support for such allegation, nor has the plaintiff directed the court to any such evidence. In Plaintiff's deposition, plaintiff indicated that he had overheard that certain individuals had used the word in referring to him. However, plaintiff admitted in his

depositions that he never heard the term used by any of the individuals alleged to have said it, nor could plaintiff identify anyone he had heard reference the use. It would be inappropriate under Federal Rules of Civil Procedure Rule 56(e) for this Court to consider speculative allegations and inadmissible hearsay. See Greensboro Professional Fire Fighters Ass'n, Local 3157 v. City of Greensboro, 64 F.3d 962, 967 (4th Cir. 1995) (Finding that inadmissible hearsay and un-attributed rumors is neither admissible at trial nor supportive of an opposition to a motion for summary judgment); Rohrbourh v. Wyeth Laboratories, Inc., 916 F.2d 970, 973 n.8(4th Cir. 1990) (unsworn hearsay not properly considered on a summary judgment motion under Fed.R.Civ.P. 56(e).

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Individuals did not vote to re-elect plaintiff Gardener because they believed he had mishandled the proxy issue at the May 24, 2001

meeting. Whether accurate or not, these considerations are not actionable, racially based considerations.

Further, this Court finds that plaintiff Gardener cannot establish that any alleged discrimination affected his ability to engage in an activity protected under section 1981. As chairman of the board, plaintiff Gardener had no contractual right to serve a second term. Although he may be re-elected to a second term, this was certainly not a guarantee. See S.C. Code Ann. 58-25-40; PDRTA bylaws, Art. II, section I.

Finally, with regards to plaintiff Gardener's Equal Protection Clause Claim, plaintiff Gardener has failed to demonstrate that he has been treated differently from others which whom he is similarly situated and that the unequal treatment was the result of intentional or purposeful discrimination. See Morrison, 239 F.3d at 654. First, plaintiff Gardener has not

shown that he was similarly situated to prior chairpersons of the board. Plaintiff Gardener was chairman during a time period when the record establishes that the PDRTA was facing numerous serious issues, most related to finances, that could allegedly threaten the PDRTA's continued viability. There is no indication that any other chair person serving during a similar time was re-elected to a second term. Additionally, plaintiff has failed to show unequal treatment that was the result of intentional or purposeful discrimination. As noted, plaintiff Gardener has offered no admissible proof that any defendant voted against his re-election based on u lawful, racial considerations. Accordingly, this Court does not conclude that plaintiff Gardener has established a prima facie case of discrimination or shown that his termination was the result of intentional or purposeful discrimination. There is simply no evidentiary bases to support plaintiff Gardener's

claim that he was not re-elected and discriminated against based on his

Race, or based on defense of the rights of a non-white. For the reasons outlined above, plaintiff Gardener's claims pursuant to 42 U.S.C. 1981 and the Equal Protection Clause are dismissed.

D. Plaintiff's First Amendment Claims

Plaintiff Gardener apparently alleges that his rights of free speech and freedom of assembly were violated as a result of the cancellation of the July 16, 2001 specially called board meeting. Plaintiff McCray asserts that his arrest amounted to a violation of his First Amendment rights because it prevented home from being able to speak to the PDRTA board at the July 16, 2001 specially called board meeting. Both claims fail for the following reasons.

A violation of the First Amendment occurs when a government's justification for restriction of constitutionally protected activity is

insufficient. See Generally, Frisby v. Schultz, 487 U.S. 474, 479 (1988). In order to make out a First Amendment claim, a plaintiff must prove that he was engaging in protected activity and that the government's restriction of that activity fails to satisfy the requisite level of constitutional scrutiny. See Generally Cornelius v. NAACP Legal Defense and Education Fund, 473 U.S. 788, 797 (1985). Governments may not impose content based restrictions on an individual's access to a pubic forum. See Generally, Madison Joint Sch. Dist. V. Wisc. Employment relations Comm'n, 429 U.S. 167, 176 (1976) (Citing Police Dep't of Chicago v. Mosley, 408 U.S. 92, 96 (1972)). Even though courts have held that public meetings are generally deemed limited public forums for First Amendment purposes, courts have also recognized that public bodies conduct public meetings pursuant to defined rules and agendas, and have afforded public entities deference in enforcing valid viewpoint

neutral rules. See Generally, Scroggins v. City of Topeka, Kan., 2 F.Supp 2d 1362, 1372-74 (D.Kan. 1998).

The record establishes that the July 16, 2001 board meeting was not held because there was

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Not a quorum of board members present to conduct official business. This is a content neutral rule of procedure, which would not constitute a constitutionally prohibited content-based restriction on plaintiff's First Amendment rights. The Court does not find that plaintiffs have established a genuine issue of material fact which regards to whether at the time the meeting was canceled there was or was not a quorum. Plaintiffs must show that there is more than just a factual dispute; the fact in question must be material, and the dispute must be genuine. Holtz v. Jefferson Smurfit Corp., 408 F.Supp.2d 193, 202 (M.D.N.C. 2006).8 If there was no public

meeting at which plaintiff Gardener could have cast his vote, there could be no governmental restriction on his right to speak. Additionally, the Court notes that plaintiff Gardener did not actually attend the July 16, 2001 meeting, but merely submitted a proxy. The record reflects plaintiff Gardener did not attend any board meetings after failing to be re-elected as chairman at the June 21, 2001 meeting even though he was still a board member. Similarly with regards to plaintiff McCray, because the meeting was not held due to a lack of quorum, McCray cannot establish that he was prevented from speaking or assembling because of the content of what he was going to say. Additionally, it appears from the record that plaintiff McCray was not arrested until after the board meeting had been called and cancelled due to a lack of quorum. Therefore, his arrest could not have prevented him from speaking or assembling at the meeting. Also, with respect to

meeting at which plaintiff Gardener could have cast his vote, there could be no governmental restriction on his right to speak. Additionally, the Court notes that plaintiff Gardener did not actually attend the July 16, 2001 meeting, but merely submitted a proxy. The record reflects plaintiff Gardener did not attend any board meetings after failing to be re-elected as chairman at the June 21, 2001 meeting even though he was still a board member. Similarly with regards to plaintiff McCray, because the meeting was not held due to a lack of quorum, McCray cannot establish that he was prevented from speaking or assembling because of the content of what he was going to say. Additionally, it appears from the record that plaintiff McCray was not arrested until after the board meeting had been called and cancelled due to a lack of quorum. Therefore, his arrest could not have prevented him from speaking or assembling at the meeting. Also, with respect to

plaintiff McCray, he is unable to prove that he was prevented in engaging in protected activity. Plaintiff McCray indicates in his deposition that at the July 16, 2001 board meeting he wanted to discuss his potential return and to thank those

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8It appears that at most there were six board members (Robinson, Boyd, Barkley, Ingram, Burns, Summons) Present in the board room when the meeting was cancelled. This would not constitute a quorum. Additionally, the Court does not find that eh affidavit of Alice Jones creates a genuine issue of material fact as to the quorum question.

Members of the board who had supported him. These personal topics do not appear to implicate public interests. Speech related to purely private matters is not protected. See generally, DiMeglio v. Haines, 45 F.3d 790, 805 (4th Cir. 1995)(Citing Connick, 461 U.S. at 142-43).

Matters related to employment, personal grievances and the like concern personal, not public interests. Id.; Stroman v. Colleton County Sch. Dist., 981 F.2d 152, 156 (4th Cir. 1992). Accordingly, the Court concludes from the record before it that plaintiff McCray cannot establish that he was engaged in or attempting to engage in any protected activity which would implicate the first amendment.

Finally, with regard to any freedom of assembly claims raised by both parties, both individuals were free to assemble, associate, and speak on other occasions, publicly or otherwise. See Generally Pell v. Procunier, 417 U.S. 817, 824 (1974) (alternative means of communication are relevant to First Amendment analysis); See also DeGrassi v. City of Glendora, 207 F.3d 636, 646 (9th Cir.2000). Just because plaintiff Gardener did not vote, and plaintiff McCray did not attend nor speak at one particular board meeting, which was not held due to a lack of

quorum, does not amount to a First Amendment violation. Accordingly, both plaintiffs First Amendment claims are dismissed.

E. Plaintiff McCray's Abuse of Process Claim

Plaintiff McCray's remaining claim for abuse of process is under state law. This Court can decline to exercise jurisdiction as to pendant state law claims if the court has dismissed all claims over which it has original jurisdiction. 28 U.S.C. 1367. As the court has dismissed all claims arising under federal law, the Court declines to exercise jurisdiction over plaintiff McCray's remaining state law claim.

F. Summary

The facts in the record asserted by plaintiffs, viewed in the light most favorable to them, are simply not sufficient to establish alleged violations of plaintiffs' constitutional rights. Accordingly, defendants are entitled to

summary judgment on all of plaintiffs' constitutional claims. Plaintiff McCray has also brought a pendant state law claim for abuse of process. However, having granted summary judgment to defendants on plaintiff's federal claims, this court declines to exercise supplemental jurisdiction over plaintiff McCray's remaining state law claim. Accordingly, this claim is hereby dismissed.

CONCLUSION

For the foregoing reasons, the undersigned GRANTS the defendants' motion for summary judgment as to plaintiffs' constitutional claims. Because the Court declines to exercise supplemental jurisdiction over plaintiff McCray's remaining state law claim, the same is hereby DISMISSED.

IT IS SO ORDERED.

S/ Terry L. Wooten
TERRY L. WOOTEN
UNITED STATES DISTRICT JUDGE

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March 16, 2006

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 06-1439

JONATHAN MCCRAY,

Plaintiff - Appellant,

And

RAY E. GARDENER,

Plaintiff,

Versus

PEE DEE REGIONAL TRANSPORTATION AUTHORITY ; GEORGE SIMMONS; ELAINE BARKLEY; EDWARD ROBINSON; ANDY INGRAM; BILL BOYD; THEODORE BURNS; JAMES B. KNIGHT; LARRY FOSTER; STEVEN RAST; ALPHONSO CAMPBELL; HAROLD KORNBLUT; NANCY FINKLEA, in their official capacities as Board Members and

individually, BEN KNIGHT, As Executive Director,

Defendants - Appellees

Appeal from the United States District Court for the District of South Carolina, at Florence. Terry L. Wooten, District Judge.
(4:04-cv-01984-TLW)

Argued December 7, 2007 Decided February 6, 2008

Before WILLIAMS, Chief Judge, and MOTZ and KING, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Chalmers Carey Johnson, Mt. Pleasant, South Carolina, for Appellant. Robert Thomas King, WILLCOX, BUYCK & WILLIAMS, P.A., Florence, South Carolina, for Appellees.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Jonathan McCray, an African American man, appeals from the district Court's grant of summary judgment in favor of the pee Dee regional transportation Authority ("PDRTA") and certain members of its Board of Directors (collectively "Appellees") on his civil rights claims.1 McCray seeks relief pursuant to 42 U.S.C. A. 1981 and 1983 (West Supp 2003 & Supp. 2006), claiming that the PDRTA terminated his employment on the basis of his race and that Appellees violated his rights under the Equal Protection Clause.2 For the following reasons, we affirm the district court's grant of summary judgment to Appellees.

I.

Because the district court granted

summary judgment in favor of appellees, we construe the facts in the light most favorable to McCray, the non-moving party. Henson v. Liggett Group, Inc., 61 F.3d 270, 274 (4th Cir. 1995). The PDRTA Board of Directors elected McCray as Executive Director in 1994, in a vote that split

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1 McCray was joined in his complaint by co-plaintiff Ray E. Gardener, a former Chairman of the PDRTA Board of Directors; Gardener, however, has not pursued an appeal in this case.

2McCray's complaint also alleges that Appellees violated his First Amendment rights, but McCray's opening brief does not address the district court's dismissal of his first amendment claim against Appellees. He has therefore waived appellate review of that claim. In re Apex Express Corp., 190 F.3d 624, 630 n.5 (4th Cir. 1999) (noting that issues not argued in

appellant's brief are deemed waived on appeal).

8 to 7 along racial lines. McCray contends that, after his election, Steve Rast, a Caucasian man, joined the Board and "began to work for the return of white control of the PDRTA, and the termination of [] McCray as its Executive Director." (J.A. at 16.) McCray claims that Rast, along with two other Caucasian Board members, Eliane Barkley and Andy Ingram, attempted to undermine McCray's position with the PDRTA through allegations of mismanagement and wrongdoing. McCray further contends that board member Edward Robinson, who is African-American, became aligned with McCray's opponents due to disagreements between Robinson and McCray over the use of PDRTA buses.

During a meeting on June 21, 2001, after the Board removed Ray Gardener, a Caucasian man, from his position as Chairman of the Board

and forced Gardener to leave the Board meeting, the members were able to garner enough votes to terminate McCray. On July 13, 2001, a majority of the Board called another meeting to vote on the possible reinstatement of McCray and Gardener. The meeting was scheduled for July 16, 2001, but before McCray could attend, he was arrested based on a warrant sworn out by Robinson. According to McCray, while under arrest he was unable to "organize and rally his supporters" (J.A. at 17), and Appellees later succeeded in cancelling the scheduled meeting by preventing a quorum of the members from attending.

II.

We review de novo a district Court's order granting summary judgment, drawing reasonable inferences in the light most favorable to the non-moving party. Henson, 61 F.3d at 274. Summary Judgment is proper "if the

pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genius issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R.Civ.P. 56(c); see Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Credibility determinations are improper on summary judgment; where resolution of an issue of fact depends upon such a determination, summary judgment is inappropriate. Gray v. Spillman, 925 F.2d 90, 95 (4th Cir. 1991).

The district court held that McCray's federal suit was barred by res judicata principles because McCray had filed an earlier civil lawsuit in South Carolina state court that was dismissed in Appellees' favor. The doctrine of res judicata precludes the assertion of a claim after a judgment on the merits in a prior suit by parties or their privies based on the same cause of action. Meekins v. United Transp. Union, 946

F.2d 1054, 1057-58 (4th Cir. 1991); Aliff v. Joy Mfg. Co., 914 F.2d 39, 42 (4th Cir. 1990). It extends to those claims that "existed at the time of the [prior] suit and might have been offered in the same cause of action..." Aliff, 914 F.2d at 43-44 (internal quotation marks

And citation omitted). For the doctrine of res judicata to apply, "'there must be: (1) a final judgment on the merits in a prior suit; (2) an identity of the cause of action in both the earlier and the later lawsuit; and (3) an identity of parties or their privies in the two suits.'" Martin v. Am. Bancorporation Ret. Plan, 407 F.3d 643, 650 (4th Cir. 2005) (quoting Pueschel v. United States, 369 F.3d 345, 354-55 (4th Cir. 2004)).

In the prior state action on which the district court based its application of res judicata principles, McCray asserted claims of malicious prosecution, defamation, and civil conspiracy

against a number of PDRTA Board members and the PDRTA. These claims arose from McCray's arrest in July 2001, which stemmed from his use of a PDRTA credit card to pay for a hotel room on the night that he was terminated by the Board.3 McCray filed his state action in late 2001, and in July 2003, the state court held two hearings on the defendants' motion to dismiss and motion for summary judgment. The state Court granted the motion to dismiss, holding that service of

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3McCray claimed that it was customary for him to rent a hotel room following board meetings and would stay at a hotel to make it easier for him to arrive at work the next morning. However, when members of the Board discovered this particular charge, some believed it to be unauthorized and contacted the local sheriff's office. One of the Board Members, Robinson, later signed an arrest warrant accusing

McCray of obtaining goods by false pretenses. When McCray arrived for the July 16, 2001, meeting regarding his possible reinstatement, he was placed under arrest in front of members of the local media. In August 2001, the charges were dismissed because Robinson, the prosecuting witness, had not suffered any loss.

Process was insufficient and that the court lacked personal jurisdiction over the defendants. The court added that even if the defendants had been properly served, they would still be entitled to summary judgment, as McCray had failed to come forward with sufficient evidence to support his claims.

McCray contends that the district court erred in concluding that this state-court decision was "final and on the merits." (J.A. at 1428.) We Agree. Under Rule 41(b) of both the Federal and South Carolina rules of Civil Procedure, a dismissal for lack of personal jurisdiction does

not operate as an adjudication on the merits. Fed.R.Civ.P. 41(b); S.C.R.Civ.P. 41(b). Because the state court dismissed McCray's previous case for lack of personal jurisdiction over the defendants, its ruling was not on the merits of the case. Moreover, when a case is dismissed on alternative grounds, one procedural and one substantive, that ruling has no res judicata effect as to substantially identical claims. Pizlo v. Bethlehem Steel Corp., 884 F.2d 116, 119 (4th Cir. 1989). Therefore, the state-court decision cannot have preclusive effect with respect to the federal claims in this case.

Hoping to avoid this conclusion, Appellees contend that our decision in Stebbins v. Nationwide Mut. Ins. Co., 528 F.2d 934 (4th Cir. 1975) (per curiam), permitted the district court to give preclusive effect to the procedural dismissal of the prior lawsuit. In Stebbins, although we noted that res judicata traditionally

Applies only to those cases that have been fully litigated on their merits, we made use of an exception to the traditional res judicata rule that bars a plaintiff from litigating his claims if "the circumstances are such that it would be manifestly unfair to subject the defendant to such an action." Stebbins, 528 F.2d at 937 (internal quotation marks and citation omitted). ID. At 937. Stebbins involved a serial litigant who had made a "career: out of suing insurance companies and had previously exhibits an "intentional, willful, and contemptuous disregard of both Court and statutory rules and requirements." ID. At 937 n.4 (citing Stebbins v. Nationwide Mut. Ins. Co., 469 F.2d 268, 270 (4thCir. 1972)). The "unfairness" to Nationwide from a new trial was "substantial and manifest," given that Nationwide had been prepared to litigate the merits of the first suit and had in fact participated in a "full-blown trial" as to the substance of the plaintiff's claims. ID. At 938.

Because the first action had been dismissed due to the plaintiff's "intentional disregard of the statutory precondition," we held that Nationwide should not be burdened with a second trial. Id.

Although Appellees claim that the rationale in Stebbins is applicable to McCray's current lawsuit, we find that the factors that compelled the result in Stebbins are not applicable here. In the present case, Appellees claim that they were prejudiced as a result of the nearly two years of litigation that resulted from

McCray's fist lawsuit, and they assert that McCray should be held accountable for "fully litigat[ing] the claims without curing the service defect." (Appellee's Br. At 14.) There is, however, no indication in the record that McCray's failure to effect proper service of process was the result of an "intentional disregard of the statutory precondition." Stebbins, 528 F.2d at 938. Additionally, while

the state court held two separate hearing, those hearings were dedicated to resolving the motion to dismiss and motion for summary judgment, as well as "related matters." Although the state court made a series of findings in granting the defendants' motion for summary judgment, it is clear that, in contrast to Stebbins, McCray's claims were never subject to an actual trial on the merits.

In sum, we conclude that the state-court judgment did not constitute a final judgment on the merits for res judicata purposes, and Appellees have not demonstrated that it would be manifestly unfair to subject them to a trial on the merits. We therefore hold that res judicata principles do not bar McCray from pursuing his present action.

III.

The district court made an alternative finding that, even if McCray's claims were not barred by principles of res judicata, they

Would still fail on the merits. In this regard, we agree with the district court.4

McCray's complaint listed, inter alia, a claims for discrimination under 42 U.S.C.A. 1981 and as a 1983 claim pursuant to the Equal Protection Clause of the Fourteenth Amendment. The elements of a claim under 1981 or 1983 mirror those of Title VII: A plaintiff must provide direct evidence of discriminatory treatment or proceed under the framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), to establish a prima facie case. See Gairola v. Va. Dep't of Gen. Servs., 753 F.2d 1281, 1285-86 (4th Cir. 1985). If a plaintiff has presented "direct or circumstantial evidence that raises a genuine issue of material fact as to whether an impermissible factor such as race motivated the employer's adverse employment decision," he is under no obligation to make out a prima facie case. Diamond v. Colonial life &

Acc. Ins. Co., 416 F.3d 310, 318 & n.4 (4th Cir. 2005). In establishing evidence of discrimination, derogatory remarks may constitute direct evidence, as long as the remarks were related to the employment decision in question and were not stray or isolated. Brinkley v. Harbour Recreation Club, 180 F.3d 598, 608 (4th Cir. 1999), abrogated on other grounds by Desert Palace, Inc. v. Costa,

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4we note that because "we review judgments, not opinions," Catawba Indian Tribe of South Carolina v. City of Rock Hill, 501 F.3d 368, 372 (4th Cir. 2007) (per curiam), we may affirm the district court on any ground supported by the record.

539 U.S. 90 (2003). McCray's evidence must clearly indicate a discriminatory motive and illustrate a nexus between that motive and the adverse employment action. Id.

The district court concluded that (1) there was no direct evidence of discrimination and (2) that McCray had not made out a prima facie case under the McDonnell-Douglas framework. We address these conclusions in turn.

A.

In this case, the district court determined that McCray failed to produce direct evidence that his termination was due to discrimination. In reaching this conclusion, the court focused on two statements proffered by McCray in support of his case: once from Benjy Rogers, a Caucasian man who served on the PDRTA Board from 1989 until 2004. In McCray's affidavit, he recalled a terse phone conversation he had with Rast in January 1999, during which Rast, apparently believing that McCray had hung up on him, allegedly stated, "I can't stand that black son of a b--ch." (J.A. at 1225.) In Rogers' affidavit, Rogers recounted a discussion that he had with Barkley regarding why McCray was

being scrutinized and criticized far more than his predecessor, during which Barkley "accosted" Rogers, who is Caucasian, and said that "[t]he only difference between you and that black S.O.B. is that you're white and he's black. The first chance we get we are going to run his ass out

Of town, no matter how good you think he is." (J.A. at 1151.) There is no indication in the record as to when this conversation took place. In evaluating this evidence, the district court concluded that theses statements did not constitute direct evidence and that even if they were evaluated as direct evidence, the court's decision would have been the same.

While isolated statements can constitute direct evidence of discrimination, the statements must be contemporaneous to the adverse employment action. See Birkbeck v. Marvel Lighting Corp., 30 F.3d 507, 511-12 (4th Cir.

1994) (statement made over two years before discharge was too remote to serve as evidence of age discrimination); See also Hemsworth v. Quotesmith.com, Inc., 476 F.3d 487, 491 (7th Cir. 2007) (particular remark can provide inference of discrimination if made around the time of adverse decision); Sheehan v. Donlen Corp., 173 F.3d 1039, 1044 (7th Cir. 1999) (isolated comment can constitute direct evidence if

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5On appeal, McCray identifies more than a dozen alleged statements that he contends are direct evidence of discrimination. Many of theses statements, however, are not substantiated by the affidavits and deposition testimony submitted by McCray and Gardner: some of the statements cannot be relied on because they are inconsistent with the evidence on record; and some of the alleged remarks are simply not direct evidence of discrimination. Finally, a large

number of the statements put forth by McCray are based upon inadmissible hearsay, as McCray relies entirely on opponents and who have not themselves provided affidavits or deposition testimony. See Evans v. Techs. Applications & Serv. Co., 80 F.3d 954, 962 (4th Cir. 1996) (summary judgment affidavits cannot be conclusory or based on hearsay).

Contemporaneous with the discharge or causally related to discharge decision-making process). In this case, McCray has failed to demonstrate that either of the alleged statements were reasonably contemporaneous with the Board's decision to terminate his employment. Therefore, we find that the district court did not err in holding that McCray failed to provide sufficient direct evidence to raise a genuine issue of material fact as to whether the Board's decision to terminate him was based on his race.

B.

While McCray has failed to provide sufficient direct evidence to support his claims, he may also avoid summary judgment by proceeding under the McDonnell Douglas framework. To demonstrate a prima facie case of discrimination, a plaintiff must show that: (1) he belongs to a protected class; (2) he suffered an adverse employment action; (3) at the time of the adverse action, he was performing his job duties at a level that met his employer's legitimate expectations; and (4) the position remained open or was filled by similarly qualified applicants outside the protected class. Holland v. Washington Homes, Inc., 487 F.3d 208, 214(4th Cir. 2007). If a prima facie case is established, the burden then shifts to the employer to provide a legitimate reason for the adverse employment action. Id. If the employer meets its burden of production, the presumption of discrimination drops from the

Case and the plaintiff once again bears the burden to prove that he was the victim of discrimination. Id.

In this case, the district court held that McCray failed to demonstrate that he was performing his job at a level that met his employer's expectations. The district court listed several problems with McCray's performance, including his obtaining loans and lines of credit without the Board's authorization, negative reviews by the Federal Transit Administration that uncovered nearly $900,000 in federal funds that the PDRTA had to return, and a number of other issues relating to McCray's contributions to the PDRTA's financial instability. Although it was "not prepared to conclude that all [the] problems of the PDRTA were the fault of plaintiff McCray." (J.A. at 1435), the district court concluded that the evidence was sufficient to demonstrate that McCray was fired because of his job performance and not because of his race.

McCray makes a series of allegations in an attempt to defend his performance, but he has presented no substantive evidence demonstrating that he was performing his job at a level that met his employer's legitimate expectations. Appellees submitted numerous audits and documents establishing that the PDRTA suffered from severe financial problems, and as the district court noted, while McCray may not deserve all of the blame for the PDRTA's extensive fiscal shortcomings, he has clearly failed to demonstrate

That his performance as Executive Director was satisfactory.6 Therefore, based on reasoning provided by the district court, we find that McCray has failed to establish a prima facie case of discrimination.7

IV.

For the foregoing reasons, the district court's dismissal of McCray's discrimination

claims is

Affirmed.

6McCray repeatedly asserts that Appellees relied on post hoc reasoning that was fabricated after his termination, and that their proffered reasons for his termination, were mere pretext for their racially motivated actions. McCray relies on an excerpt from Barkley's deposition transcript that he asserts that eh Board had no legitimate reason to terminate him. At her deposition, Barkley was asked about a comment she made to Ben Knight, the new executive director, at a 2002 Board meeting, in which she wanted him to "dig" for information on McCray. (J.A. at 240.) McCray claims that Barkley's proves that she was completely unaware of any malfeasance on his part at the time she voted to fire him. The questions asked during this portion of the deposition, however, are somewhat vague

and indirect, and Barkley's answers indicate that she merely wanted further investigation into whether McCray was engaged in additional malfeasance of which she or the board was still unaware. In any event, Barkley's isolated commends regarding efforts to "dig" up information on McCray are not inconsistent with any prior statements and no not provide sufficient evidence of a pretextual reasoning for McCray's termination.

7McCray also alleges that Appellees were guilty of abuse of process. We have considered this argument and find it to be without merit.

(2)

No. 07-1207

FILED
MAY 21 2008
CLERK

IN THE

Supreme Court of the United States

JONATHAN McCRAY,

Petitioner,

v.

PEE DEE REGIONAL TRANSPORTATION AUTHORITY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

ROBERT THOMAS KING
WILLCOX, BUYCK & WILLIAMS, P.A.
248 W. Evans Street
P.O. Box 1909 (29503-1909)
Florence, SC 29501
(843) 662-3258 - Tel.
(843) 662-1342 - Fax

Counsel for Respondents

216002

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

I. Whether Petitioner has failed to present compelling reasons for granting the Petition where he does not even attempt to argue that the Fourth Circuit's opinion affirming the district court's grant of summary judgment conflicts with a decision of this Court or another court of appeals, conflicts with a decision of a state court of last resort on an important federal question, decided an important federal question that has not been settled by this Court, or so far departs from accepted judicial proceedings or sanctions such a departure as to require an exercise of this Court's supervisory power?

II. Whether the Petitioner has failed to present compelling reasons for granting the Petition where he merely argues that the Fourth Circuit and the district court construed the facts erroneously and misapplied properly stated rules of law, neither of which occurred?

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STATEMENT OF THE CASE

The Petitioner brought this action relating to his termination as Pee Dee Regional Transportation Authority ("PDRTA") Executive Director and subsequent arrest for misappropriation of PDRTA funds. The Petitioner asserted claims under, among other provisions, 42 U.S.C. § 1981 and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

The respondent PDRTA is a regional transportation authority established under the section 58-25-10 of the South Carolina Code of Laws. Like other regional transportation authorities, the PDRTA is governed by a board of directors. Its day-to-day functions are administered by an executive staff, including an executive director who serves at the pleasure of the board of directors.

The Petitioner served as the PDRTA executive director from 1994 until June 21, 2001. The respondents Edward Robinson, George Simmons, Elaine Barkley, Andy Ingram, Bill Boyd, Theodore Burns, Larry Foster, Steven Rast, Alphonso Campbell, Harold Kornblut, and Nancy Finklea are, or were at relevant times, members of the PDRTA board of directors. Robinson[1], Simmons, Boyd, Burns, and Campbell are African-American. The defendant James B. Knight (now deceased) was the PDRTA executive director immediately following the Petitioner, but during different times relevant to the

1. For some unknown reason the Petitioner continues to describe Robinson's race as white. He is, and always has been, an African-American.

Petitioner's claims, was employed as either the PDRTA deputy director, the PDRTA director of operations, or the PDRTA interim executive director.

Beginning in 1997 certain PDRTA board members, primarily Rast followed by Robinson and then, over time, others, began to have serious concerns regarding the manner in which the Petitioner was operating the PDRTA. Rast's initial concerns involved such things as: increases in the rate of payables and receivables; increases in per-passenger subsidy and costs; purchases of equipment for amounts in excess of what had been authorized by the board of directors; and similar issues. Rast began to raise these concerns at board meetings, but was met with resistance by the Petitioner and other board members. As it turned out, Rast's initial concerns proved to be only the tip of the iceberg. In the months and years following, board members began to learn of additional facts which raised grave doubts about the manner in which the Petitioner was operating the PDRTA.

In 2000 the Federal Transit Administration ("FTA") conducted its triennial review of the PDRTA for fiscal years of 1998, 1999, and 2000. This review revealed serious questions regarding the PDRTA's use of federal funding, and led to an FTA investigation. Ultimately, the FTA found, among other things, the PDRTA was seriously deficient in the area of financial management and compliance, including such things as dramatically insufficient local share match revenue, insufficient documentation to support draw-down requests, overdraws of funds, and the like. As a result of these deficiencies, the FTA suspended disbursement of grant

money to the PDRTA. The FTA also required that all draw-down requests submitted by the PDRTA be specifically reviewed and approved. In addition, the FTA directed the PDRTA repay the United States Treasury $170,980.00 plus interest for an overdraw of funds.

As a result of the triennial review and subsequent investigations, the FTA directed the PDRTA to recalculate local match requirements for fiscal years 1998, 1999, and 2000. The FTA suspended the PDRTA's abilities to draw on federal funding and ultimately demanded that the PDRTA return $895,083.00 (plus interest) in overpayments resulting from the PDRTA's improper treatment of local share revenue and other financial errors. The FTA also discovered that the PDRTA, under the Petitioner, had attempted to utilize improper local share revenue relating to a $3,000,000.00 appropriation from Congress. As a result, the FTA ordered the PDRTA to repay an additional $600,000.00.

The PDRTA relies heavily on federal funding for its operations. Thus, the FTA's demand for repayment of well over a million dollars in federal funds and suspension of the PDRTA's ability to draw on federal funding threatened the continued viability of the PDRTA. Yet, the Petitioner offered no recovery plan, nor did he seek the board's input on the development of one – as a matter of fact, the Petitioner kept the board in the relative dark as this dire situation developed. His sole plan for resolving these issues was to seek forgiveness of the debt, which the FTA and the Department of Justice refused to do. In fact, it was only after the Petitioner was terminated that the PDRTA was able to develop a recovery plan acceptable to the FTA.

In addition to the FTA investigations, the board learned that the Petitioner had secured lines of credit, in the amounts of $1,000,000.00 and $250,000.00, and a loan, in the amount of $214,161.40, in the PDRTA's name without board approval and without the signature of the board chairman, both of which are required by PDRTA bylaws. (Under the PDRTA by-laws, the Chairman of the Board of Directors must sign "all agreements, contracts, deeds, notes, mortgages, bonds or other instruments which commit the Authority to an expenditure of funds or use of resources, except as otherwise specified by vote of a majority of the membership voting" and that "[a]ll bonds, notes, mortgages and other evidence of indebtedness of the Authority shall be signed by the Chairman except as otherwise specified by vote of a majority of the membership.") When board members repeatedly requested that the Petitioner produce minutes and/or resolutions authorizing the loans, the Petitioner was unable to produce any such records as there were none. At the time of the Petitioner's termination as executive director, the PDRTA owed several-hundred thousand dollars on those loans.

Also coming to light at this time were significant, widespread problems with other aspects of the PDRTA's financial condition, service delivery, and employee morale, all of which cast grave doubt on the Petitioner's ability to effectively lead the PDRTA. For example, certain vendors vital to the PDRTA's operations would deal with the PDRTA on a cash-only basis until the Petitioner was terminated. The State of South Carolina would not allow the PDRTA to purchase gasoline at state discounts; thus, the PDRTA had to purchase gas using

private credit cards at retail prices. Additionally, the PDRTA was delinquent in its payments on worker's compensation and other insurance premiums. And board members were receiving complaints from public officials and customers regarding service delivery problems, and from employees regarding the tyrannical manner in which the Petitioner was exercising his powers as executive director. In fact, the service delivery and customer complaints were so widespread that the PDRTA was losing service contracts with — and funding from — several governmental entities.

Despite the fact that the PDRTA was on the precipice of fiscal and operational ruin, the Petitioner consistently advised the board that the PDRTA was on sound financial footing and was operating effectively. During board meetings in the months and years leading up to the Petitioner's termination, Robinson, Rast and other board members consistently and repeatedly raised their concerns about the PDRTA's poor financial condition, the Petitioner's leadership or lack thereof, the Petitioner's repeated disobedience to and refusal to comply with board directives and requests, low employee morale, service complaints and the like, but were rebuffed by the Petitioner and a group of board members supportive of the Petitioner.

At a PDRTA board meeting on May 24, 2001, several board members' dissatisfaction with the Petitioner's performance culminated in a motion, made by Robinson (again, an African-American), requesting that the Petitioner tender his resignation effective immediately. That motion ultimately failed for want of a majority, with nine voting for the motion and nine voting against.

At the following board meeting on June 21, 2001, Robinson made a motion to terminate the Petitioner immediately. The motion passed on a nine to seven vote. Those voting in favor of termination were the defendants Robinson, Rast, Barkley, Campbell (by proxy), Burns, Ingram, Simmons, Finklea, and Kornblut. Of these nine, four are African-American: Robinson (who made the motion for termination), Burns, Simmons, and Campbell. The defendant Foster was absent from the meeting and did not submit a proxy. Among those voting against termination was the respondent Boyd, an African-American. Knight was named interim executive director.

At the time of the Petitioner's termination, the PDRTA owed over two million dollars to the federal government and private lending institutions, but had absolutely no plan for financial recovery.

After extensive discovery, the Defendants moved for summary judgment. The district court granted summary judgment finding, among other things, that the Petitioner had failed to produce sufficient admissible evidence to withstand a properly supported summary judgment motion. Following an appeal, the Fourth Circuit Court of Appeals affirmed by unpublished *per curiam* opinion. Both the district court and the Fourth Circuit determined that the Petitioner's so-called evidence, direct or indirect, of discriminatory intent was comprised, in the main, of inadmissible hearsay, unsupported allegations and contradictory statements, and that the Respondents put forth a legitimate, performance-based reason for his termination.

REASONS FOR DENYING THE PETITION

The Fourth Circuit's opinion does not conflict with a decision of this Court or another court of appeals, does not conflict with a decision of a state court of last resort on an important federal question, did not decide an important federal question that has not been settled by this Court, and did not so far depart from accepted judicial proceedings or sanction such a departure as to require this Court to exercise its supervisory power. To the contrary, the Petitioner merely argues that the Fourth Circuit and the district court construed the facts erroneously and misapplied properly stated rules of law, neither of which occurred. As such, the Petitioner has not demonstrated "compelling reasons" justifying that the petition be granted.

I. The Fourth Circuit's opinion does not conflict with the decision of this Court or any other court, address or resolve an unsettled federal question, or entail, represent or sanction a departure from the usual course of proceedings.

Pursuant to Rule 10 of the Supreme Court Rules, a writ of certiorari will issue "only for compelling reasons," which include:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the

> accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> * * *
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Nowhere in his petition does the Petitioner point to even one decision of this Court or any other court with which the Fourth Circuit's opinion conflicts. Likewise, the Petitioner does not even attempt to argue that the Fourth Circuit's actions or opinion represents, embodies, or sanctions a departure from "the accepted and usual course of judicial proceedings" in any manner, much less in such a manner as to require this Court to exercise its supervisory powers. Finally, the Petitioner does not even suggest that the Fourth Circuit decided an important, but unsettled, federal question.

In short, the petition is utterly silent on exactly what "compelling reasons" exist for granting a writ of certiorari in this action. There are no such compelling reasons. As such, the Petitioner has failed to carry his burden, and the petition should be denied.

II. The entirety of the petition is devoted to the Petitioner's view that the Fourth Circuit made erroneous factual findings and misapplied properly stated law, neither of which occurred.

"A petition for writ of certiorari is rarely granted when the asserted error consists of factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10. Here, the Petitioner's petition consists of nothing more than the implicit argument that the Fourth Circuit and the district court erred in their factual findings and misapplied well-established and correctly-stated principles of law. In fact, the petition is simply an attempt by the Petitioner to re-argue the exact arguments made to and rejected by the courts below. As such, the Petitioner has not presented any compelling reason justifying the issuance of a writ of certiorari.

Even so, the Petitioner's arguments are misplaced, as both the Fourth Circuit and the district court made the correct factual findings and correctly applied properly stated rules of law.

In order to establish a prima facie case under 42 U.S.C. § 1981, a plaintiff must prove: (1) that he is a member of a protected class; (2) that he was qualified for the position and that his performance satisfied his employer's expectations; (3) that he was dismissed; and (4) that his position was filled by a member of a non-protected class. *Gairola v. Commonwealth of Va. Dep't of Gen'l Servs.*, 753 F.2d 1281, 1286-87 (4th Cir. 1985); *Honor v. Booz-Allen & Hamilton, Inc.*, 383 F.3d 180, 188 (4th Cir. 2004). And in order to make out an equal

protection claim, "a plaintiff must first demonstrate that he has been treated differently from others with whom he is similarly situated and that the unequal treatment was the result of intentional or purposeful discrimination." *Morrison v. Garraghty*, 239 F.3d 648, 654 (4th Cir. 2001); *Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810, 818-19 (4th Cir. 1995) (plaintiff must prove that the defendants intended to discriminate through the "clear and intentional" introduction of an illegal classification in their actions). The essential elements of an equal protection claim are the same as one under 42 U.S.C. § 1981. *See Gairola*, 753 F.2d at 1286.

A plaintiff's burden of establishing a prima facie racial discrimination claim can be satisfied through either direct or indirect proof of discrimination, or through the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *E.E.O.C. v. Clay Printing Co.*, 955 F.2d 936, 940 (4th Cir. 1992) (ADEA claim). Under either method, a plaintiff always retains the "ultimate burden" of proving "that the defendant intentionally discriminated against the plaintiff." *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

In support of his claim that there existed "direct" evidence of discrimination, the Petitioner relies upon several allegations and accusations, which he continually mischaracterizes as "direct quotes." Applying well-established principles of law to the record, the Fourth Circuit and the district court correctly determined that this so-called "direct evidence" consisted of, in the main, inadmissible hearsay, contradictory statements, conclusory allegations and rank speculation, which are

insufficient, as a matter of law, to withstand a properly supported motion for summary judgment. *See, e.g., Greensboro Prof'l Fire Fighters Ass'n v. City of Greensboro*, 64 F.3d 962, 967 (4th Cir. 1995) (speculation does not constitute probative evidence which can be used to withstand summary judgment); *Rohrbough v. Wyeth Laboratories, Inc.*, 916 F.2d 970, 973-76 (4th Cir. 1990) (inadmissible hearsay and contradictory statements cannot be considered); *Md. Hwys. Contractors Ass'n, Inc. v. State of Maryland*, 933 F.3d 1246, 1252-53 (4th Cir. 1991) (same); *Barwick v. Celotex Corp.*, 736 F.2d 946, 960 (4th Cir. 1984) (genuine issue of material fact cannot be created by conclusory allegations and affidavits which conflict with previous deposition testimony); *Goldberg v. B. Green and Co., Inc.*, 836 F.2d 845, 848 (4th Cir. 1988) (subjective beliefs and unsupported allegations cannot be used to oppose summary judgment successfully). The Fourth Circuit also properly concluded that much of the Petitioner' purported evidence do not bear on the employment decision at issue, and thus provides no nexus between any alleged discriminatory intent and the Petitioner's termination. *See, e.g., Fuller v. Phipps*, 67 F.3d 1137, 1142 (4th Cir. 1995) ("[w]hat is required is evidence of conduct or statements that both reflect directly the alleged discriminatory attitude and that bear directly on the contested employment decision"); *Brinkley v. Harbour Recreation Club*, 180 F.3d 598, 608 (4th Cir. 1999) (plaintiff must establish a direct nexus between the allegedly discriminatory statements and the employment action), *abrogated on other grounds by Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003).

In the instant petition, the Petitioner, however, fails to even address, must less convincingly argue, how the Fourth Circuit's conclusions are incorrect. As if saying something enough times will eventually make it so, in his brief the Petitioner simply recounts, over and again, the same "evidence" rejected previously and proclaims there to be a genuine issue of material fact.

For example, the Petitioner claims that Ray Gardner, a former PDRTA board chairman, stated that respondents Barkely (who is white), Ingram (who is white), and Simmons (who is African-American) called him and stated that the "whites" needed to stick together (indeed, a curious statement to have been made by Simmons) and terminate the Petitioner. During his deposition, Gardner was questioned about these purported conversations, and failed to disclose about any racial comments made by any of these individuals. Thus, this purported "quote" was properly rejected as not only inadmissible hearsay, but also contradictory to prior sworn deposition testimony. The Petitioner offers no reason why such a conclusion is improper.

The Petitioner also claims that respondent Boyd (an African-American) told him in 1994 that certain white employees were not to be touched and that the Petitioner couldn't undo the good things that white employees had done. This evidence, too, was rejected. Even assuming its truth, the alleged statement was made some seven years prior to termination by a board member who was a *supporter* of the Petitioner and who voted *against* the motion to terminate. Clearly it has no bearing on the employment decision, much less provides a direct nexus between the decision to terminate and any discriminatory intent.

Similarly, the Petitioner proclaimed, in two affidavits (one of which was unsigned and thus not properly considered under Rule 56 of the Federal Rules of Civil Procedure) that other board members (non-parties) told him not to bow to the supposed "racist" group seeking his termination, that a third party told him that another third party opposed him because of his race, and that a third party advised him that two board members called another board member by a racist name. The Petitioner raised all of these purported statements before the district court and the Fourth Circuit, and they were properly rejected as inadmissible hearsay. Moreover, these statements directly contradict the Petitioner's own deposition testimony: when asked repeatedly and extensively about any and all evidence of racially-charged statements, discriminatory intent or the like of which he knew, had heard or was otherwise aware, the Petitioner failed to disclosed a single incident as described.

Both the Fourth Circuit and the district court determined that the Petitioner's "direct evidence" claim boiled down to two alleged statements: (1) one by Rast that "I can't stand that black son of a b—tch," and (2) one by Barkley to another board member that "the only difference between you and that black S.O.B. is that you're white and he is black. The first chance we get we are going to run his ass out of town, no matter how good you think he is." Both courts correctly determined that the Petitioner had failed to establish that either of these statements were anything more than isolated comments, and were insufficiently contemporaneous, by time or other circumstances, to the board's decision to terminate to create a genuine issue of material fact.

Again, the Petitioner fails to point out how this conclusion is erroneous.

Given that the Petitioner failed to produce direct evidence of discrimination, the Fourth Circuit and the district court properly analyzed, and then rejected, the claims under the *McDonnell Douglas* framework. Under the *McDonnell Douglas* framework, if a plaintiff establishes a prima facie case of discrimination using circumstantial evidence, the burden of production shifts to the employer to produce evidence that "it acted with a legitimate, nondiscriminatory reason." *Williams v. Staples, Inc.*, 372 F.3d 662, 667 (4th Cir. 2004). If an employer satisfies its burden of production, the burden then returns to the plaintiff to establish that the employer's proffered reason is a mere pretext, and that race is the real reason. *Id.* at 667.

The lower courts analyzed the record, and properly concluded that the Respondents had carried their burden of producing evidence that it terminated the Petitioner for legitimate, nondiscriminatory reasons. As detailed, under the Petitioner's watch and as a result of the Petitioner's actions: the PDRTA owed over two million dollars to the federal government and various financial institutions; the PDRTA was encountering serious operating difficulties due to the failure to pay various vendors; the PDRTA was losing contracts because of service problems and customer complaints; and PDRTA employee morale was low. After conducting its triennial review of the PDRTA, the FTA had found that the PDRTA was plagued with serious financial, management, and accounting problems. As a result, the PDRTA was confronting a suspension on its ability to

draw on federal funding. Despite all of the problems identified by the FTA, the FTA's imposition of severe penalties against the PDRTA and the FTA's demands for repayment of significant sums of money, all of which threatened the continued viability of the PDRTA, the Petitioner had no plan for recovery. He did not even think it necessary to fully advise the board of the dire circumstances facing the PDRTA, much less seek the board's input on what to do next.

Additionally, the Petitioner undertook many acts which were either outside of his authority as executive director or were in excess of the authority granted by the board. For example, the Petitioner secured lines of credit and loans without board authorization and without the board chairman's signature, and the Petitioner made purchases which exceeded the financial limits set by the board. He consistently failed to keep the board advised as to the true condition of the PDRTA. Obviously, the Petitioner was apparently either unwilling or unable to recognize the legitimate limits placed on his authority to act, seemingly deemed the authority and wishes of the PDRTA board as insignificant, and repeatedly acted either with complete disregard for or in defiance of the board's instructions.

The Petitioner attempts to ignore or downplay the significance of these events in an effort to suggest that the near financial ruin of the PDRTA was a mere pretext for racial discrimination. For example, the Petitioner now claims that audits in 1999 prove that the PDRTA was financially sound, ignoring the fact that the FTA review and investigations, and much of the massive debt, came in 2000 and 2001. He also claims, rather incredibly, that

the FTA's review was racially motivated as evidenced by the fact that the match recalculation was ordered to go back to 1998 only, the year that the white finance director retired, ignoring the fact that the FTA triennial review was limited to three fiscal years immediately prior (i.e., 2000, 1999, and 1998), hence the use of the term "triennial" review.

The Petitioner also contends that he was never provided a reason for his termination and that the Petitioners were looking for legitimate reasons after-the-fact to support the termination. Such a blatant mischaracterization of the record was properly rejected by the Fourth Circuit.

First, the board minutes reveal that just prior to making the motion to terminate the Petitioner, respondent Robinson stated openly that he had grave concerns about the direction in which the PDRTA was heading and the manner in which it was being run, that the PDRTA was losing funding because of those concerns, and that the PDRTA needed to change directions for the sake of its future operations. Immediately following Robinson's statements on the record, a motion to adjourn failed and Robinson then made a motion to terminate the Plaintiff. After a discussion by the board about problems with the Plaintiff's performance, the motion to terminate passed. There was, therefore, an explanation given for the motion to terminate the Plaintiff, and thus for the termination itself.

Second, even if an explanation satisfactory to the Petitioner was not offered at the moment of his termination, Rast's, Robinson's, and other board members' expressed concerns about the dire financial condition of the PDRTA, including the FTA's investigations, determinations and penalties (financial and otherwise), the Petitioner's performance and perceived (if nothing else) mismanagement, the Petitioner's repeated defiance and violation of board directives and authorization, the unauthorized loans and lines of credit, the Petitioner's failure to comply with board members' requests and the like were known to all, including the Plaintiff, beginning as early as 1997. In fact, those concerns, particularly as repeatedly and constantly expressed by Rast and Robinson, were never hidden and, in fact, became a constant source of friction at board meetings: the Petitioner was well aware of them, even if he disagreed. Any further elaboration at the time of the Petitioner's termination would have been superfluous, and the absence of an explanation of what had been made known repeatedly for years prior is not evidence of pretext.

The Petitioner also contends that Barkley's directive, in February of 2002, for the PDRTA staff to "dig, dig, dig" into the records is evidence that the Respondents were attempting to fabricate, after-the-fact, a reason for the termination, and thus constitutes proof of pretext. As the Fourth Circuit recognized, the Petitioner takes this statement completely out of context. The directive to the PDRTA staff to dig (she denies stating "dig, dig, dig") related to finding possible criminal conduct committed by the Petitioner during his tenure at the PDRTA. The board was already aware of

the Petitioner's misuse of a PDRTA credit card, and there was concern that there was much more malfeasance of a criminal nature of which they were not aware. Barkley's statement had absolutely nothing to do with any reasons for the Petitioner's termination and is not evidence of pretext.

Finally, the Petitioner finds vindication that Congress ultimately forgave the PDRTA's debt to the FTA. With absolutely no proof whatsoever, the Petitioner claims that Congress found that the PDRTA was not at fault – Congress in fact made no such finding. As a matter of fact, forgiveness came in 2005, four years after the Petitioner had been terminated, and only after the PDRTA had developed and implemented an FTA-approved recovery plan and been repaying on the debt for those four years. The fact that forgiveness of the debt had to come in the form of a genuine, not just a proverbial, Act of Congress after the PDRTA had been laboring under and repaying the debt for four years should offer no solace to the Petitioner.

That the Petitioner may think that the FTA's investigations, the PDRTA's resulting million-plus dollar debt to the federal government, and the other problems which beset the PDRTA were of no significance or that he has provided an alternate explanations for them is irrelevant. In an incredible display of self-aggrandizement (and self-delusion), the Petitioner's proclaims his performance to have been "excellent, if not flawless." Unfortunately for him, it is his employer's perception, not his perception, which matters. *Evans v. Techs. Apps. & Serv. Co.*, 80 F.3d 954, 960-61 (4th Cir. 1996). And both the Fourth Circuit and the district court

correctly determined that the Respondents' perception that the Petitioner's performance was not acceptable or worthy of continued employment is legitimate, non-discriminatory, non-pretextual, and amply supported by the record.

The Petitioner argues nothing more than that the Fourth Circuit's factual conclusions were erroneous. The Petitioners arguments are both unsupported by the record and fail to demonstrate any compelling reasons to justify the grant of the petition for writ of certiorari.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT THOMAS KING
WILLCOX, BUYCK & WILLIAMS, P.A.
248 W. Evans Street
P.O. Box 1909 (29503-1909)
Florence, SC 29501
(843) 662-3258 - Tel.
(843) 662-1342 - Fax

Counsel for Respondents